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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

-against-

ALLAN P. KIRBY, Jr. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; Charles T. Ireland, Jr. and Robert J. Fitzsimmons, and ALLEGHANY CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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To the Honorable Chief Justice and Associate Justices:

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit denying petitioners' motion to vacate for lack of jurisdiction the opinion and judgment dated May 8, 1968 in Docket Nos. 28397, 31115 and 31342, and to review said judgment, opinion and related orders.

OPINIONS BELOW

No opinion was filed by the Court of Appeals in denying the Motion to Vacate for lack of jurisdiction its opinion and judgment dated May 8, 1968. The opinion which was the subject of the motion is appended as Appendix A hereafter and is reported at 394 F. 2d 381 (2 Cir. 1968). The opinion of the district court is appended as Appendix B hereafter and is reported at 264 F. Supp. 268 (DCNY 1967)

JURISDICTION

The order denying the motion to vacate the opinion and judgment of the 3-judge court below for lack of jurisdiction was dated June 5, 1968 and entered on that date (78a), thereby making final the judgment (79a) and related orders dated and entered on May 8, 1968. (80a-81a). Jurisdiction is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

Jurisdictional questions

1. Where a Court of Appeals sitting in banc, pursuant to Section 46(c) of Title 28, U. S. C., has "heard and determined" an appeal by a 4-4 vote, do two circuit judges and a district judge sitting by designation as a circuit judge, have jurisdiction under Section 46(c) to "hear and determine" appeals and motions seeking to vacate the in banc judgment for lack of Constitutional jurisdiction and fraud upon the in banc court?

2. Do the acts of the 3-judge panel in hearing and determining motions and appeals directed to the vacatur of a judgment entered by 8 circuit judges sitting in banc constitute an unauthorized "rule of practice and procedure" that has been promulgated neither by this Court nor the court below and in violation of Section 2071 of Title 28 U. S. C. ?

3. Where prior to the decision and entry of judgment by a Court of Appeals sitting in banc, the defendant-appellees acquired control of the plaintiff-appellant corporation is the judgment void because of the lack of an existing "case" or "controversy" between "parties having adverse legal interests" within the meaning of the Constitution of the United States, Article 3, Section 2 and the decisional law of this Court? *

4. May stockholders who were not parties to the in banc judgment and who had no notice of the action until more than a year after its entry be barred by a 3-judge panel from attacking it for lack of Constitutional jurisdiction in the 8-judge in banc Court of Appeals on res judicata grounds when the jurisdictional issue was neither submitted to the court nor "heard and determined" nor raised sua sponte either in the panel or in banc court or in this Court in granting and then dismissing on other grounds the petitions for writ of certiorari (Holt v. Kirby, 384 U. S. 28) ?

* Poe v. Ullman, 367 U. S. 497, 505, citing South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300; Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240-241; Mills v. Green, 159 U. S. 651, 654 and cases cited.

Conflict of circuit questions

5. In view of the conflict between the circuits which Court of Appeals has stated the correct procedure for counsel to follow in seeking to vacate on the ground of fraud upon the court a judgment affirmed by a Court of Appeals:

(a) the Court of Appeals for the Second Circuit in requiring in this case that the affidavits in support of the charge of fraud first must be offered in the district court?

(b) the Court of Appeals in the other Circuits who require, as petitioners did here, that the affidavits first be filed in the Court of Appeals that affirmed the judgment?

6. May petitioners be denied a trial of their charges of fraud and of the credibility of the conflicting affidavits of the federal special master, the defendants' attorneys, and the moving parties because they offered their affidavits not in the district court but in the Court of Appeals as required by Hazel-Atlas Co. v. Hartford Empire, 322 U. S. 238, 249, note 5; In re Potts, 166 U. S. 263; Hartman v. Lauchli (8 Cir.), 304 F. 2d 431, 432-433; and Goldwyn Pictures Corp. v. Howell Sales Co., (2 Cir.), 287 F. 100?

Questions under Rule 53(a), F. R. C. P.

7. Where the rule is clear that "The practice of masters approaching litigants' attorneys and bargaining with them for fees is not consistent with the proper administration of the office and should not be sanctioned" (Universal Oil Products Co. v. Hall, 8 Cir., 76 F. 2d 258, 263), was it reversible error for the court below to refuse an investigation of the special master-referee's "bargaining" privately for his fee with the attorney of the defendant exculpated by his report because the report had long before been submitted?

Is such an exception to the rule against a special master "bargaining" for a higher fee with the attorney for a party for whom he has made a favorable report consistent with the high standard of conduct required of federal masters under Rule 53(a) of the Federal Rules of Civil Procedure where the Court of Appeals found "that the evidence did not compel the (favorable) result" to the defendant whose attorney was approached?

8. Where after rendering favorable reports exculpating the chief defendant in the federal and state courts, a federal court special master and state court referee, admittedly made an off-the-record ex parte demand of the defendant's attorney for a fee of $25,000 in excess of a proffered $100,000, the attorney consented thereto, and the Court of Appeals subsequently found "that the evidence did not compel the (favorable)

result" to the defendant "reached by Fitzsimmons" (the referee-master) and that there was "highly questionable conduct" by the defendant who had been exculpated, and that there was "impropriety" in "letting the state court set the (federal) Special Master's fee"

(a) May the Special Master retain his fee without application to the district court, as required by Rule 53(a) of the Federal Rules of Civil Procedure, on the grounds of res judicata where plaintiffs had no notice of the state court proceedings and where their representation was inadequate since the attorney representing the corporation was the nominee of the chief defendant and the issue of exclusive jurisdiction under Rule 53(a) in the federal court was not raised?

(b) Where a contemporaneous memorandum quotes the corporation's attorney as having disclosed to an affiant that the federal special master secretly visited the attorney and demanded $25,000 in excess of a proffered fee of $100,000 for "special services" consisting of the referee-master's "general perspective toward the whole case" and the

fact he "fell over backwards" when "there were cries for Kirby's testimony;" that he "strained" to let Kirby off, and "to say the least," took a "very charitable attitude toward the IDS transaction", and the special master and attorney admit the visit but deny the content of the conversation by affidavit, was it reversible error for the Court of Appeals to deny petitioners the right to examine the federal special master and the attorney under oath?

9. After proving the secret off-the-record ex parte visits by the federal special master to the corporation and chief defendant's attorneys respecting his fee, was it necessary for the petitioners to prove the contents of the conversations in order to set aside the judgment founded on the referee-master's reports exculpating the chief defendant? Or was not the proof that such visits had been made sufficient under the "Caesar's wife rule" relating to the conduct of referees and masters to bar giving res judicata effect to judgments based on the confirmation of the referee-master's reports? *

* "Caesar demanded that his wife should not only be virtuous, but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our government." People ex rel. Union Bag & Paper Co. v. Gilbert, 256 N. Y. S. 442, 444, aff'd 236 App. Div. 873.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Art. III, Sec. 2

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and * * * to controversies * * * between citizens of different states * * * ."

Judicial Code of the United States

§ 46. Assignment of judges; divisions; hearings; quorum

* * * * * * * * * *

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof. As amended Nov. 13, 1963, Pub.L. 88-176, § 1(b), 77 Stat. 331.

* * * * * * * * * *

§ 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.

Rule 53(a), Federal Rules of Civil Procedure

"Masters.

(a) *Appointment and Compensation.*

• • • the court in which any action is pending may appoint a special master therein. • • • The compensation to be allowed a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. • • •"

PRIOR PROCEEDINGS IN THIS COURT

This Court in Holt v. Kirby, 384 U. S. 28 (1966), after granting writs of certiorari to review the en banc judgment in Alleghany Corporation v. Kirby, 340 F. 2d 311 (2 Cir. 1965) dismissed the writs as improvidently granted, pursuant to a 4-3 decision.

The proceedings hereinafter referred to were subsequently instituted in the Court of Appeals.

STATEMENT OF THE CASE

1. The 3-judge panel decision of appeals and of motions to vacate a judgment entered by 8 judges sitting in banc under 28 U. S. C. A. 46(c)

On April 17, 1967 petitioners filed an application in the United States Court of Appeals for the Second Circuit for an order directing petitioners Smith and Wiener to conduct an investigation to aid the court in determining whether its judgment in Alleghany Corporation v. Allan P. Kirby et al., 340 F. 2d 311 (2 Cir. in banc) was procured by fraud.

On February 8, 1968 petitioners filed a motion in the Court of Appeals to vacate the in banc judgment on the ground that the proof tendered by affidavits in support thereof showed the in banc judgment affirming the judgment of the district court in dismissing the complaint (218 F. Supp. 164) had been procured by fraud.

Notwithstanding that the motions sought a vacatur of a judgment entered by an 8 judge in banc court, a 3-judge panel without referring the motions to the in banc court and with no stated authority in any statute or court rule denied the motions on May 8, 1968.

On the same day and in the same opinion the 3-judge panel affirmed dismissal of the complaint in Smith v. Fitzsimmons et al., a civil action which also sought a vacatur, among other relief, of the in banc judgment in Alleghany Corp. v. Kirby. In addition to

filing the Smith complaint, petitioners Smith and Wiener moved in the district court for a vacatur of the decision and judgment in the Alleghany case on the ground that by the time it was decided in the Court of Appeals the defendant-appellees Kirby had acquired control of the plaintiff-appellant Alleghany Corporation. Petitioners contended that by reason of this fact the Court of Appeals in rendering its in banc judgment lacked Constitutional jurisdiction since there was no "case" or "controversy" at the time of entry of judgment within the meaning of Article 3, Sec. 2 of the Constitution of the United States. The May 8, 1968 opinion of the 3-judge panel of the Court of Appeals also affirmed the denial of this motion by the district court.

On May 22, 1968 petitioners filed in the Court of Appeals a motion to vacate the judgment and opinion of May 8, 1968 for lack of jurisdiction in the 3-judge panel that decided the motions and appeals. Petitioners contended that under Sections 46(c) and 2071 of Title 28, U. S. C. A., and Rules 19(c) and 25 of the Rules of the Court of Appeals, the 3-judge panel lacked jurisdiction to determine whether or not a judgment entered in by an 8-judge in banc court should be vacated either for fraud upon that court or lack of Constitutional jurisdiction in that court.

By order dated June 5, 1968 the 3-judge panel denied the motion to vacate without opinion. At the same time it denied an application for extension of time to file a petition for rehearing.

2. **The 3-judge panel decision that the 8-judge in banc court had Constitutional jurisdiction at the time of entry of judgment and that the issue was res judicata, although the appellees Kirby had acquired control of the appellant Alleghany Corporation and the issue was not litigated.**

After holding that the Court need not resolve a procedural point as to which Court - appellate or district - a motion to vacate the appellate judgment should have been made in, Judge Smith stated:

> Appellants' second point goes to the merits—it is that this court lost jurisdiction of *Alleghany* v. *Kirby* when the Kirby forces regained control of Alleghany, because there was no longer a justiciable controversy. However, the case heavily relied upon by appellants—*South Spring, supra*—involved a situation where the corporate litigants had both come under control of the same persons *before* oral argument, and it seemed clear that the controlling persons were, in effect, asking the Supreme Court for advice on how certain minority interests should be treated. Here, the situation was very different, for *Alleghany Corporation* v. *Kirby* was vigorously argued to this court by attorneys clearly representing adverse parties, and the Kirby takeover had no effect on the posture of the case as it was submitted to the court for decision. The only effect the takeover might have had would be on the submission on the reconsideration *in banc*, and on the decision not to seek review on certiorari. Be that as it may, the three-judge panel had jurisdiction, at least. Moreover, this court's determination, implicit in its decision, that there was a

justiciable controversy is *res judicata*, and not open to collateral attack. *Swift & Company* v. *United States*, 276 U. S. 311, 326 (1928). Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940). Appellants contend that there was no adjudication of the constitutional "justiciable controversy" issue because the issue was not brought specifically to this court's attention. But the issue *might* have been raised, and that is what is crucial. See *Chicot County Drainage District* v. *Baxter State Bank*, *supra*. The failure to seek certiorari, suspect though it may be (see Judge Hays' dissent in 344 F. 2d at 575), was cured by the Court's grant of certiorari on the application of the intervenors. There is no indication that the later dismissal of certiorari was on the ground that procedurally the case was not properly before the Court. The ruling of Judge Weinfeld that the determination was not open to collateral attack was correct.[3]

In neither of the two cases relied on by the Court of Appeals did the appellees acquire control of the appellant prior to entry of the judgment.

In both cases, also, the attack on jurisdiction came from persons who had actual notice of the case prior to judgment or who were parties to it. The record herein shows that neither petitioner Smith nor petitioner Wiener had any notice of Alleghany Corporation v. Kirby until more than a year after the entry of the in banc judgment.

As early as South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300 (1892) this Court refused to determine an appeal after being advised that the control of both parties to the suit - each a corporation - had come into the hands of the same persons. This Court decided that the appropriate remedy was to vacate the judgment below, and in a long line of cases cited in Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240-241; United States v. Munsingwear, 340 U. S. 36, 39-40; and Poe v. Ullman, 367 U. S. 497, 505 this Court has followed that rule.

At no time was this question submitted to nor determined by the Court of Appeals, and we submit that the 3-judge panel erred not only in failing to refer it to the 8-judge in banc Court but in resolving that it had been "implicit in its decision" that the South Spring Gold Co. rule did not apply. There is absolutely no language either in the in banc or panel decisions (333 F. 2d 327; 340 F. 2d 311) upon which to base a finding of "implicit" decision. Nor has any citation been made of any authority which bars on res judicata grounds a person from attacking a judgment affecting his interests when he had no notice of the action prior to entry of judgment.

3. The pyramid of fraud by Kirby and Alleghany Corporation against the minority stockholders and upon the courts uncovered by 14-years of painstaking and laborious activities of the minority stockholders

(i) In May, 1950 Allan P. Kirby and Robert R. Young as President and Chairman of Alleghany Corporation discovered that the "projected 1950 income before taxes or capital transactions amounted to $20 for each IDS (Investors Diversified Services, Inc.) share" of capital stock. They thereupon "acquired for $8.15 from Alleghany in the exchange transaction" a total of 48,125 IDS shares. (333 F. 2d 327.

(ii) Prior thereto they secured the ratification of the exchange transaction by the Alleghany shareholders by means of proxy material which failed to disclose the $20 per share IDS projection. (333 F. 2d at 333-334)

(iii) By 1955 Kirby and Young had $15,000,000 profit (now at least $84,000,000) on the transaction.

(iv) Thereupon, after being sued in the federal and state courts by minority stockholders upon this and other transactions, they agreed to settle all the claims for $1,000,000 cash, without disclosing the $20 per share projection.

(v) Robert J. Fitzsimmons, a respondent herein as defendant-appellee, was named as state court referee and federal special master.

(vi) Thereafter in November, 1958 referee-master Fitzsimmons in integrated reports filed in both courts, federal and state, recommended approval of the $1,000,000 cash settlement. Subsequently decrees were entered in both courts approving in effect the joint settlement after minority stockholders' counsel had objected successfully to Judge Dimock against the confirmation of the reports and compelled Kirby and the Young Estate to increase the cash settlement by $2,000,000 more than the sum approved by the referee-master, or a total of $3,000,000. (333 F. 2d 327)

(vii) The 1960 orders of approval came under attack in 1962 when Alleghany Corporation under new control of the Murchisons amended a complaint in Alleghany Corporation v. Kirby so as to plead that documents material to the settlement of the 1950 transaction had been concealed by Kirby from Referee Fitzsimmons.

(viii) The district court dismissed the complaint on the ground that the state court judgment confirming the referee's report was res judicata of the issue. Alleghany Corporation v. Kirby, 218 F. Supp. 164.

(ix) Upon appeal the Court of Appeals panel divided 2-1 and upon rehearing in banc the court affirmed by 4-4 vote the dismissal of the complaint. (333 F. 2d 327; 340 F. 2d 311) This Court

granted petitions for writs of certiorari and then by a 4-3 vote (Justices Black, Harlan & White dissenting) dismissed them as improvidently granted after Kirby's counsel had argued the absence of a substantial federal question. (Holt v. Kirby, 384 U. S. 28)

(x) In July, 1966 two Alleghany minority stockholders Morris Smith and David Wiener (petitioners herein) filed Smith v. Fitzsimmons, Kirby & Alleghany Corporation, 66 Civil Action 1638 in the district court for the southern district of New York, alleging that federal special master Fitzsimmons had unlawfully obtained his fee for services as master under Rule 53(a), F. R. C. P. by application and order of approval in the state court; that he had entered into a conspiracy with Kirby and Alleghany to defraud the minority shareholders of his impartial judicial services and had received in payment thereof $125,000 from Alleghany by an unopposed, unappealed from order of the state court awarding him that amount after secret ex parte conversations with Kirby's attorney; and that the judgment of the Court of Appeals in Alleghany Corporation v. Kirby, 340 F. 2d 311 (in banc) had been procured by fraud upon the court because it was based on a judgment confirming his reports as special master and referee without disclosure to the court of his conspiracy with Kirby and Alleghany Corporation. The complaint sought rescission of the $125,000 "fee" of Fitzsimmons, an accounting by Kirby and vacatur of the in banc judgment.

By order entered March 1, 1967 the district court granted defendants' motions for summary judgment dismissing the complaint. In so doing it accepted defendants' affidavit denials and refused plaintiffs request for depositions.

The fraudulent conduct of referee-master Fitzsimmons as shown in the present record. (R. 278-342)

(i) he approved settlement of claims against Kirby and Young exceeding some $15,000,000 for only $1,000,000. Only by opposing his reports in the federal court were the minority stockholders able to increase the settlement to $3,000,000 cash.

(ii) the Court of Appeals judges, both those affirming the original dismissal and those dissenting, found that Fitzsimmons' exculpation of Young and Kirby was contrary both to the law and the evidence.

(iii) the appellate judges found that the 1950 IDS exchange transaction whitewashed by Fitzsimmons "violated fundamental legal principles against self-dealing", "that the proxy statement on the basis of which the stockholder ratification was sought was misleading" after Fitzsimmons found to the contrary; and "There certainly was enough evidence to justify a rejection (by Fitzsimmons) of the proposed settlement." (333 F. 2d 333, 334)

(iv) the sworn statement of counsel for petitioners - a member of the bar for some 40 years - that the court reporter who took the dictation for and typed the referee's report had informed another "member of the bar of this Court" that Kirby's attorney had written the report. The Court of Appeals

refused to give petitioners the power of subpoena so as to obtain this testimony of the member of the bar in question nor to test the affidavit denial of the court reporter. The court did this on the erroneous ground that there had been "litigation of the same issues" in the district court in the Smith v. Fitzsimmons case when that court had not been presented with any affidavits because of the rule that affidavits in support of a proceeding to reopen for fraud a judgment that had been affirmed must first be offered in the appellate court that affirmed the judgment. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238, 249, note 5; In re Potts, 166 U. S. 263; Hartman v. Lauchli, (8 Cir.), 304 F. 2d 431, 432-433; and Goldwyn Pictures Corp. v. Howell Sales Co., (2 Cir.) 287 F. 100.

(v) A bill submitted by the court reporter, prior to the filing of the referee-master's reports, to Alleghany Corporation, attention of David W. Wallace, Esq., dated July 31, 1956, "Re: REPORT OF REFEREE FITZSIMMONS To preparing and typing services, rough draft of report of the Referee, Hon. Robert J. Fitzsimmons (dictation not complete) * * * $461.70." (R. 278, Exhibit "B", p. 2). Alleghany was then under control of Kirby and favored the settlment approved by the referee-master.

Judge Smith in his decision below states: "The claim is, of course that Schwartz (the court reporter) had submitted the bill to those to whom he had rendered the services, and that this indicates that somebody other than Fitzsimmons had dictated the report. Both Fitzsimmons and Daly (a Kirby lawyer) deny (by affidavits) the allegation. Schwartz states that

the report was dictated to him by John Mooney, an attorney from Fitzsimmons' office, and that it was in accord with the customary practice of his office in protracted reference proceedings to bill Alleghany during the course of the proceedings before Fitzsimmons (they had billed Alleghany and were paid by Alleghany for the transcript of the proceedings)." But the Court of Appeals refused to allow petitioners to examine the court reporter or Mooney, the alleged author of the Fitzsimmons report or Fitzsimmons or any Kirby attorney under oath with respect to this extraordinary bill. * It adhered to the erroneous position, contra to its own decision in Goldwyn, supra, that petitioners should have offered the evidence first in the district court instead of the Court of Appeals although it was offered in support of the motion to vacate the in banc Court of Appeals decision.

(vi) Under date of April 26, 1960 Alleghany's attorney Ireland, a Kirby appointee, wrote Kirby in Florence, Italy, that "Referee Fitzsimmons came to see me last Friday to ask if we would have any objection to his submitting his bill to the court for approval prior to the time all of the plaintiffs' counsel submitted their applications.* * * * it might be better if we cheerfully agreed to this in the interest of possible important relations. *** " ** (emphasis and notes supplied)

* The prior payment of a referee's fee was explicitly disapproved by the Appellate Division in Marine Midland Tr. Co. v. 40 Wall Street, 213 N. Y. S. 2d 689, 697.

** Minority stockholder Bohlenbach was opposing the settlement. Zenn v. Anzalone, 11 App. Div. 2d 939.

(vii) Alleghany under Kirby's control agreed to giving referee-master Fitzsimmons priority in his fee application, and on May 3, 1960 he applied in the state court without application to or order by the federal court for a fee of $150,000 for his "services" as federal special master and state court referee, or more than 20% of the $700,000 cash settlement which resulted in the orders appointing him referee-master, or 15% of the $1,000,000 cash settlement approved in "his" reports. Petitioner has been able to find no reported case in which a referee or master was awarded as here a sum ($125,000) as high as 12% of the cash value of a reference.

(viii) On May 31, 1966 in another litigation not before this Court, Alleghany's attorney Ireland admitted under oath that referee-master Fitzsimmons privately visited him at his office with respect to his fee application but he could not recall the discussion.

(ix) By affidavit sworn to October 19, 1966 referee-master Fitzsimmons admitted a visit privately to attorney Ireland respecting his fee application, after it was publicly filed, but contended he merely sought to suggest that the corporation "file an affidavit with the Court indicating what it considered to be the value of my services."

(x) By affidavit sworn to April 17, 1967 Randolph Phillips, an Alleghany consultant at the time of the 1960 fee application, appended copies of memoranda he had made on June 8, 9 & 10, 1960 of conversations with Alleghany's

attorney Ireland in which referee-master Fitzsimmons demanded $25,000 more than a fee of $100,000 "proffered" by Kirby's attorney Robert M. Loeffler, in which Fitzsimmons stated he had rendered "special services" to Kirby in his "general perspective to the whole case" and "to say the least I fell over backwards when there were cries for Kirby's testimony. Frankly, the Graubard witnesses were so much better than the other witnesses, that I strained to let him off. To say the least, taken a very charitable view toward the IDS transaction. Said been contacted by friends of APK (Allan P. Kirby), $125,000 agreed. Offered to be helpful in any future matter. (Judge) Owen McGivern is not noted for generousity at least compared to some other judges."

(xi) Ireland denied by affidavit sworn to November 29, 1967 that he had made the above admissions to Phillips, but he admitted he had "one meeting with Mr. Fitzsimmons at my office pursuant to a previous appointment made by him."

(xii) By affidavit sworn to October 19, 1966 Fitzsimmons alleged "I had no further contact with Mr. Ireland" than the meeting referred to in (ix) above, and by affidavit sworn to November 14, 1967 he denied he had made the statements to Ireland set forth in (x) above.

(xiii) On its erroneous view of the law that the memoranda set forth in (x) above should

have first been offered in the district court, instead of the Court of Appeals whose panel and in banc decisions rested on the integrity of the referee's report as a disinterested judicial official. As shown by the cases cited it was the obligation of petitioners first to file their proof in the court of appeals that affirmed the judgment at issue, especially where a vacatur of the court of appeals' own judgment is being sought.

(xiv) By affidavit sworn to in the Court of Appeals on November 14, 1967 Kirby's attorney Robert M. Loeffler admitted that Fitzsimmons in a private meeting with him had demanded $25,000 more than a $100,000 fee proffered him off-the-record by Alleghany's counsel for his "services" as referee-master. Judge Smith totally omits from his opinion below that Fitzsimmons met with Loeffler. Loeffler's affidavit states: "Justice McGivern then telephoned Mr. Fitzsimmons and informed him of my view that $150,000 was high, and Mr. Fitzsimmons took issue with my view and reaffirmed his request for $150,000. It is my recollection that Mr. Fitzsimmons came to Mr. Justice McGivern's chambers after the telephone call while I was still there and we met very briefly on that occasion. After I was advised of Mr. Fitzsimmons' position * * * I discussed my recommendation and Mr. Fitzsimmons' opposition with Mr. Ireland, and he subsequently authorized me to offer a fee of not more than $125,000. Accordingly, I telephoned Justice McGivern and so informed him. Shortly thereafter, Justice McGivern telephoned me that he

would enter an order to that effect." At no point did Mr. Justice McGivern, the state judge, confirm this explanation. And the Court of Appeals, before whom the affidavit was filed, refused to allow petitioners to examine into the affidavit's allegations, although it is clear it confirms substantial elements of the Phillips memoranda, including the proffer of $100,000 and the demand for $25,000 more by the referee-master.

(xv) Fitzsimmons in his affidavits in the district court - inquiry into which by examination under oath was barred - and in the Court of Appeals failed at all times to mention his meeting with Loeffler.

(xvi) "The practice of masters approaching litigants' attorneys and bargaining with them for fees is not consistent with the proper administration of the office and should not be sanctioned." (Universal Oil Products Co. v. Hall, 8 Cir., 76 F. 2d 258, 263, citing numerous state and federal decisions. The courts below failed to measure the facts by this rule, and the appellate court held that since the "bargaining" was long after the referee-master's report was filed it would not order an investigation although it indictated the result would have been different if the "bargaining" took place before the filing. This is an erroneous application of the "Caesar's wife rule" for judicial officials: it only means that "bargaining" before filing appears to solicit a bribe from the party to be favored in the report, while "bargaining" after filing the report with the party favored is akin to soliciting a "payoff". It was error

therefore for the court below to restrict the "Caesar's wife rule" for special masters and referees to the prior case and not the latter. On the admitted facts, the court below should have applied the rule of the Universal Oil Products case and it was error not so to do.

(xvii) Once a special master has admitted meeting with the attorney for the party on behalf of whom an exculpatory report has been made, it should not be necessary for the moving party to prove the substance of the off-the-record secret conversation. The mere fact of such an improper meeting, especially when both the corporation's attorney and the attorney for the exculpated defendant admit the subject matter was the referee-master's fee, should be sufficient to set aside the judgment based on the referee-master's report as well as the order awarding him his fee as federal master. Any other application of Rule 53(a) of the Federal Rules of Civil Procedure respecting master's, their fees and reports, weakens high standards for the administration of justice in the federal courts.

The basis of federal jurisdiction below

In Smith v. Fitzsimmons the basis was Rule 53(a), F. R. C. P. and diversity, as to first count; ancillary jurisdiction was alleged as to the other counts based on the earlier case of Alleghany Corp. v. Kirby, 218 F. Supp. 164.

4. Since under Rule 53(a) of the Federal Rules of Civil Procedure the district court has exclusive jurisdiction to fix the fee of special master, it was error for the 3-judge panel to rule that the award of the fee by the state court was res judicata when the issue had never been raised in the state court, no notice had been given of the fee application to the minority stockholders, including the plaintiffs herein, and the corporation paying the fee was under the control of defendant Kirby and was represented not by independent counsel but by Kirby's appointee.

The first count in Smith v. Fitzsimmons et al., USDC SDNY, 66 Civil 1638, alleged that Robert J. Fitzsimmons had improperly obtained in the state court his fee as special master in the federal court for services in Breswick & Co. v. Briggs. Upon the admitted facts that he had applied for his federal special master's fee in the state court and that Alleghany Corporation represented by defendant Kirby's counsel had made no objection had made no objection thereto or to the order awarding him $125,000 as fee for his "services" in the federal case as special master and as referee in the related case of Zenn v. Anzalone, plaintiffs moved for summary judgment requiring Fitzsimmons to repay his fee to Alleghany.

The district court denied the motion, holding it barred on grounds of res judicata, and the Court of Appeals affirmed. Rule 53(a), F. R. C. P. vests exclusive jurisdiction in the district court to fix the special master's fee and to

and to select the party to be charged. Both of these protections were denied petitioners Smith and Wiener who, as minority shareholders, had received neither notice of the action or of the fee application. In addition their representation in the state court by the corporation, which consented to and paid the fee without objection or appeal, was inadequate since counsel for the corporation were also Kirby's counsel and yet they made no contention he should be charged with the fee as the chief tortfeasor.

Thus the Court of Appeals was in error in affirming the first count's dismissal on res judicata grounds based on Stella v. Kaiser, 218 F. 2d 64, 65 (2 Cir. 1954, dictum). In that case the objecting stockholders both had prior notice and had appeared in the action. Here neither was the case. Furthermore, exclusive federal jurisdiction over the subject matter, here the special master's fee application, has never been deemed by this Court to be waived when it has not been actually litigated in the state court. The court below failed to cite any authority of this Court for its unique holding.

REASONS FOR GRANTING THE WRIT

I.

The assumption of jurisdiction by a 3-judge panel over appeals and motions to vacate a judgment in an appeal "heard and determined", pursuant to Section 46(c) of Title 28, U. S. C. A., by an 8-judge in banc Court of Appeals, constitues an impairment of the in banc jurisdiction of the appellate court without authority in any statute of Congress, rule of court, or reported case. This is an important question of federal law which if not settled by this Court by reversal will affect the in banc jurisdiction of all courts of appeal.

II.

In failing to vacate the in banc judgment entered in Alleghany Corporation v. Kirby, 340 F. 2d 311, assuming the 3-judge panel had jurisdiction, because of the prior acquisition

of control of the plaintiff-appellant by the defendant-appellee, the court below decided an important question of federal jurisdiction under the "case" or "controversy" clause of the Constitution of the United States, Art. 3, Sec. 2 contrary to the long-established decisional law of this Court. South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300; Mills v. Green, 159 U. S. 651, 654; Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 240-241; Poe v. Ullman, 367 U. S. 497, 505, and cases cited therein.

III.

In barring an attack on the in banc judgment for lack of Constitutional jurisdiction under Art. 3, Sec. 2 on res judicata grounds of an "implicit" determination and "might have been

raised" character, the court below invoked a rule contrary to the long-established federal rule that a judgment may be attacked for lack of jurisdiction when the issue has not been submitted to and determined by a court and by a person who had no notice of and was not a party to the judgment.* The two cases cited by the court below are not in point: in neither had appellee acquired control of appellant, in neither was the attack made by a stranger to the action, and in both an attack was sought to be made by a party to the judgment or by persons with notice thereof.

* The record is barren of any proof that petitioners Smith and Wiener ever received any notice of Alleghany v. Kirby prior to entry of the Court of Appeals' judgment.

IV.

The decision below conflicts with the rule of procedure prescribed by this Court and other circuit courts for seeking a vacatur of a judgment affirmed by a court of appeals. Petitioners filed their affidavits alleging fraud in procuring the appellate judgment in the court of appeals as required by Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238, 249, note 5; In re Potts, 166 U. S. 263; Hartman v. Lauchli (8 Cir.), 304 F. 2d 431, 432-433; and Goldwyn Pictures Corp. v. Howell Sales Co. (2 Cir.), 287 F. 100. The court below ignored its own decision in Goldwyn and ruled contrary to the above cases the affidavits should have been filed first in the district court. Nevertheless the court below recognized "It is the rule in most circuits that where the action which

the district court is asked to take under Rule 60(b) would disturb the judgment ordered by the appellate court's mandate, the district court lacks power to proceed until leave is obtained. 7 Moore, Federal Practice par. 60.30(2). This court has not yet decided whether the rule should be established in this circuit... We need not resolve this question here in view of our determination on the merits." (slip opinion, pp. 2145-2146 on jurisdictional issue). It then held on the fraud issues "All the matter ... was or could have been presented to Judge Bonsal (of the district court) and may not be held back and subsequently used as the basis for relitigation of the same issues (in the court of appeals)." (slip opinion, p. 2159) Thus by reason of following the Second Circuit's own decision in Goldwyn, supra, and "the rule

in most circuits" , petitioners have been deprived of trial of the fraud issue and of the credibility of the opposing affidavits despite the pyramid of fraud already revealed respecting the acts of the federal special master and the appropriation by defendant Kirby and Young of $15,000,000 in corporate securities (now worth $84,000,000).

V.

The decision of the court below in allowing the federal master to retain the fee granted him by the state court constitutes a decision of a federal question in conflict with the applicable decisions of this Court and in violation of the exclusive federal jurisdiction vested in the federal courts under Rule 53(a), F. R. C. P. The issue of jurisdiction was neither

submitted to nor determined by the state court and the "exclusive jurisdiction" of the federal court may not be waived. In re Gilbert, 276 U. S. 6; Newton v. Consolidated Gas Co., 259 U. S. 101; Moore's Federal Practice, Vol. 5, par. 53. 04(3). The failure "to make stern and searching inquiry into the facts and to inform itself fully what the conduct of its officer had been" violates the rule of those cases, as summarized in Universal Oil Products Co. v. Hall, (8 Cir.), 76 F. 2d 258, 264. The application of the bar of res judicata to plaintiffs when the issue of exclusive federal jurisdiction was neither submitted to nor decided by the state court and they had no notice of the proceedings conflicts with the rule of this Court in Hansberry v. Lee, 311 U. S. 32 and cases cited therein.

VI.

This case involves the standard of conduct to be applied to a federal special master appointed under Rule 53(a), F. R. C. P. If the rule of the court below is sustained that he can apply in a state court for his fee nor be deprived of it when he has been shown to have approached ex parte the attorney for the defendant whom he had favored in his reports and to have "bargained" with him secretly and successfully for the fee's increase by $25,000 over the $100,000 proffered, and if the rule can be sustained after the court of appeals has found that the referee-master's report was erroneous in fact and law in its exculpation of the defendant with whose attorney as well

as the corporation's attorney he clandestinely visited, then the standards of the administration of federal justice will have been substantially lowered.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 152, 153—September Term, 1967.

(Argued February 20, 1968 Decided May 8, 1968.)

Docket Nos. 31115, 31342, 28397

MORRIS SMITH and DAVID WIENER,

Applicant-Appellants,

—v.—

ALLEGHANY CORPORATION,

Plaintiff-Appellee,

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; FRED M. KIRBY and CHARLES T. IRELAND, JR.,

Defendants-Appellees.

MORRIS SMITH and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Plaintiffs-Appellants,

—v.—

ROBERT J. FITZSIMMONS; ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; and ALLEGHANY CORPORATION,

Defendants-Appellees.

ALLEGHANY CORPORATION,

Plaintiff-Appellant,

—v.—

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY,

Defendants-Appellees.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and GIGNOUX, *District Judge.**

Appeal in No. 31115, *Smith, et al.* v. *Alleghany, et al.,* from an order of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* denying motion to intervene in *Alleghany* v. *Kirby* and void the judgment. Affirmed.

Appeal in No. 31342, *Smith, et al.* v. *Fitzsimmons, et al.,* from judgment in the United States District Court for the Southern District of New York, Dudley Bonsal, *Judge,* denying plaintiffs' and granting defendants' motion for summary judgment in action for repayment of special master's fee. 264 F. Supp. 728 (1967). Affirmed.

Motions under Rule 19(c) in No. 28397 to set aside judgment in *Alleghany* v. *Kirby,* denied.

ROBERT L. BOBRICK, New York City, *for applicants-appellants Smith and Wiener.*

RANDOLPH PHILLIPS, New York City, *applicant pro se.*

* Of the District Court of Maine, sitting by designation.

JOHN E. TOBIN, New York City (Granville Whittlesey, Jr., Peter J. Gartland, Benjamin Vinar, and Donovan, Leisure, Newton & Irvine, New York City, on the brief), *for defendants-appellees Kirby and Ireland, Jr.*

VINCENT R. FITZPATRICK, New York City (Anthony F. Phillips, and Willkie, Farr, Gallagher, Walton & Fitzgibbon, New York City, on the brief), *for Alleghany Corp.*

SAMUEL N. GREENSPOON, New York City (Pollack, Greenspoon & Singer, New York City, on the brief), *for defendant-appellee Fitzsimmons.*

SMITH, *Circuit Judge*:

We have considered together an appeal in No. 31115, *Smith, et al.* v. *Alleghany, et al.*, an appeal in No. 31342, *Smith, et al.* v. *Fitzsimmons, et al.*, and motions to set aside the judgment in No. 28397, *Alleghany* v. *Kirby*, entitled as motions under Rule 19(c). We find no error on the appeals and affirm in both cases. We deny the motions.

Nos. 31115 ("Smith v. Alleghany") and 31342 ("Smith v. Fitzsimmons"), and the motion in No. 28397 ("Alleghany v. Kirby"), are attempts to revive the litigation which grew out of a 1949-50 self-dealing transaction by four of the directors of Alleghany Corporation ("Alleghany").

In 1949, Alleghany acquired 85% of the voting stock, and 48,000 shares of "class A" common stock, of Investors Diversified Services (IDS), a highly leveraged investment company (and investment advisor to a large mutual fund complex). In December 1949, it was resolved at a meeting of Alleghany's board of directors that Alleghany offer to its officer-directors the opportunity to acquire "class A"

IDS stock in exchange for Alleghany preferred stock. After shareholder approval, Alleghany on May 15, 1950 transferred 48,125 shares of IDS "class A" common to Allan P. Kirby and Robert R. Young (president and chairman of the board, respectively, and both directors) in exchange for 4,840 shares of Alleghany preferred. The IDS stock was transferred at a price of $8.1453 a share, and by 1954 its price had advanced to about $200.00 a share.

Numerous derivative actions, based upon the alleged illegality of the above transaction, as well as alleged irregularities in other transactions, were brought on behalf of Alleghany against various of its officers and directors (including Kirby, Young, and Clint W. Murchison, Jr. and John D. Murchison) in 1954. Ten such actions were consolidated in the New York courts under the title of *Zenn* v. *Anzalone* ("Zenn"). Ten more were consolidated in United States District Court (Southern District of New York) under the same title. [The latter action, according to the affidavit of Benjamin Vinar (Donovan, Leisure, Newton & Irvine), was dismissed for lack of prosecution on August 9, 1966. See Appendix for Kirbys in No. 31342, p. 41A.] Although Kirby was made a defendant in both actions, he was served only in the federal one.

Another derivative action on behalf of Alleghany, entitled *Breswick* v. *Briggs,* was commenced in United States District Court (Southern District of New York) on February 14, 1955. Randolph Phillips was retained as a consultant to the plaintiffs' attorney in the *Breswick* action.

Negotiations between Abraham L. Pomerantz (attorney for the plaintiffs in both the state and federal *Zenn* actions) and representatives of the defendant officers and directors resulted in April 1955 in a tentative settlement of *all* claims asserted in *any* pending derivative action involving Alle-

ghany. The consideration was to be $700,000 cash paid by the defendants to Alleghany, plus the revision in favor of Alleghany of certain loss guarantees issued by the Murchisons in connection with certain joint ventures.

Upon application by Alleghany in the New York Supreme Court for approval of the settlement, that court appointed Robert J. Fitzsimmons as Referee, directing him to inquire into the "fairness, reasonableness and adequacy" of the stipulation of settlement. Notice of the terms of the proposed settlement was mailed to all Alleghany stockholders, and one Samuel R. Rosen, a stockholder represented by the law firm of Graubard & Moskovitz, appeared as an objectant to the settlement. Randolph Phillips served as a consultant to Graubard, and worked with him and Rosen in opposing the settlement in hearings which commenced before Fitzsimmons on September 19, 1955 and continued until January 1956. Kirby was excused from appearing at those hearings by Fitzsimmons. (A doctor testified that appearing would endanger Kirby's life.)

Meanwhile, the attorneys in the *Breswick* action, asserting that their exclusion from the *Zenn* settlement negotiations had been unfair, brought a proceeding in United States District Court to enjoin the defendants in *Breswick* from interposing in that action "any defense based upon any judgment entered in any action other than this action pursuant to any agreement not negotiated with the [*Breswick*] plaintiffs or their attorneys." An injunction was granted, by order dated October 27, 1955.

At the conclusion of the hearings before Fitzsimmons, the *Breswick* defendants moved to vacate the injunction in their case, and after argument of the motion, Judge Walsh of the United States District Court suggested that settlement of the entire litigation be discussed between

plaintiffs and the defendants, who included Kirby. Negotiations followed, and led to an increase over the offer made in *Zenn*. But the *Breswick* plaintiffs still were not satisfied, and when the defendants again moved to vacate the injunction, the United States District Court appointed Fitzsimmons as Special Master to hear and report on the good faith of the *Breswick* settlement proposal. These hearings were held in October and November, 1956. Fitzsimmons submitted a report to the United States District Court on November 17, 1958 recommending that the injunctive order be vacated. On the same day he submitted a report to the New York Supreme Court recommending that the original stipulation of settlement in *Zenn*, as augmented by the additional settlement, be approved. (By the terms of the settlement as it stood at that time, defendants were to pay $1,000,000 cash to Alleghany; the loss guarantee was to be amended; and a transaction in which the Murchison brothers had obtained 130,000 shares of IDS voting common was to be reversed.)

The matter of confirming the reports was argued in both the state and federal courts. The objectant stockholder Rosen, in *Zenn*, presented three basic points relating to the 1949-1950 IDS transaction, all of which had, of course, also been presented to Fitzsimmons as Referee: (1) Kirby and Young, it was alleged, had possessed inside knowledge that the earnings of IDS would increase approximately 500% in 1950 alone; (2) the December 1949 directors' meeting was allegedly illegal; and (3) the directors had allegedly failed to disclose material facts, etc. to the stockholders in the proxy statement for the meeting at which the exchange was ratified.

Justice McGivern of the New York Supreme Court approved the settlement as recommended by Fitzsimmons on

March 9, 1959. *Zenn* v. *Anzalone*, 17 Misc. 2d 897, 191 N. Y. S. 2d 840. He noted that "this court is the beneficiary of a lucid, painstaking and comprehensive report of a Referee achieved after protracted hearings which more nearly resembled a trial on the merits than on the adequacy of the proposed settlement. • • • The Referee has concluded that . . . the amended offer of settlement constitutes a fair, reasonable and adequate basis for a settlement of this litigation . . . " 191 N. Y. S. 2d at 843-844. Justice McGivern stated, however, that no order could be entered upon his decision until after action by the United States District Court on the motion to vacate the injunction.

Judge Dimock of the United States District Court took a somewhat less favorable view of the suggested settlement; on September 22, 1959 he rejected Fitzsimmons' report as Special Master and referred the matter back to him for further hearings. Phillips, who had a hand in both the *Zenn* and *Breswick* actions, realized that Judge Dimock's order improved the plaintiffs' position considerably. He therefore got in touch with Charles T. Ireland, Jr., an attorney representing Alleghany and Kirby, and advised him that new hearings would now be held at which Kirby would have to testify. [Young had died on January 25, 1958, and Kirby had then become Chief Executive Officer and Chairman of the Board of Alleghany.] At the time, one Mr. Daly (of Lord, Day & Lord) was representing Alleghany and Kirby and the other defendants; Daly and Mr. Adams, who represented the Murchisons, were opposed to allowing Phillips to participate in the settlement discussions. Daly preferred to deal with Pomerantz, with whom the original $700,000 settlement had been worked out, but Graubard (who represented stockholder Rosen) objected to that. Daly apparently thought that further hearings

should be held, and that Kirby should testify. Meanwhile, dissension grew in the plaintiffs' ranks. Phillips managed to keep the pressure on Kirby, however, and Kirby inquired of Daly what his maximum liability might be. Daly's response, dated October 22, 1959, indicated that liability in connection with the IDS exchange transaction might cost Kirby $22,800,000, or, if he were held jointly liable, $39,350,000. Kirby then authorized Ireland to negotiate settlement terms with Phillips. [It is interesting to note, however, that Phillips' extra leverage was obtained by the federal court's refusal to approve the Special Master's report in the *Breswick* litigation, which did *not* involve the IDS exchange transaction.]

During the final settlement negotiations, in late 1959, Kirby decided to change attorneys (apparently as a result of Daly's failure to advise him as to whether he could settle individually). The firm of Donovan, Leisure, Newton and Irvine was substituted for Lord, Day & Lord, with the understanding that they would try to work out a settlement of Kirby's individual liability by the end of the year.

Intensive negotiations on December 19 and 20, 1959, produced a final settlement, under which Kirby agreed to make a payment of $1,100,000 in addition to his obligation under the $1,000,000 basic settlement earlier arrived at. On December 24, Judge Dimock was advised that the Young estate was willing to contribute an additional $900,000 to the basic settlement; accordingly, the *Breswick* plaintiffs agreed to the vacating of the 1955 injunction. The effect of the final settlement was that Alleghany would receive $3,000,000 from the various defendants, and that control of IDS would be returned to Alleghany from the Murchisons. The settlement was approved by the New York Supreme Court on December 28 and 29; between those

dates and May 1960, Alleghany issued releases to the defendants. A judgment dismissing the action on the merits as to all parties was entered in New York Supreme Court on June 21, 1960.

The order entered by Justice McGivern on December 29, 1959, approving the final settlement, provided that Fitzsimmons might apply to the New York Supreme Court for an allowance for his services both as Referee in that court and as Special Master in the United States District Court. Prior to making his fee application, Fitzsimmons spoke with Judge Dimock about the allowance for his services, and was told that he would not be required to proceed in the United States District Court with reference to fees for his services as Special Master. Fitzsimmons made application to the New York Supreme Court on May 16, 1960, for $150,000 compensation for his services as Referee and Special Master. In his affidavit submitted with the application, Fitzsimmons referred both to the amount of effort expended by him and to "the value of the ultimate settlement" in arriving at the $150,000 figure. The only party to the settlement which objected to that figure was Alleghany; Ireland, acting as its attorney, submitted a memorandum in which he pointed out that: "Applicant's compensation for services rendered as Referee and Special Master could in no wise depend upon the value of the recovery for the corporation; the Applicant would be entitled to compensation for his services had there been no recovery whatever for the corporation." The memorandum suggested that appropriate compensation for the maximum estimate of Fitzsimmons' time would be $115,000. Fitzsimmons subsequently met with Ireland at the latter's office, and suggested that Alleghany file an affidavit with the court indicating what it considered the value of the ser-

vices to be. Justice McGivern, by order dated June 10, 1960, fixed the fee at $125,000; it appears that before doing so he communicated with Alleghany and was advised by counsel that the sum would be acceptable.

We next come to what has been termed by Judge Friendly the "Willheim chapter" of the Alleghany Corporation—that chapter which takes us "through the proxy contest resulting in the victory of the Murchison brothers over Allan P. Kirby at the annual meeting of the stockholders of Alleghany Corporation in May 1961." See *Phillips* v. *S. E. C.*, —— F. 2d —— (2 Cir. slip opinion 1007, 1008, January 16, 1968). Simultaneously with the commencement of that proxy contest, the Murchisons, on September 8, 1960, brought a derivative action in the United States District Court for the Southern District of New York against Kirby, Phillips, Ireland, and six other defendants. The suit was brought on behalf of Alleghany, which was named as a nominal defendant. [After the Murchisons' victory in the proxy fight, Alleghany was substituted as party plaintiff, and the action was dismissed as to all defendants other than Kirby, Phillips, Ireland and Fred M. Kirby.]

The gravamen of the complaint, as amended, was in the allegation that there had been fraud in the obtaining of the settlements (and in the obtaining of the United States District Court order vacating the 1955 injunction in *Breswick*). The complaint focused upon Kirby, seeking *inter alia* the following relief: (1) That the December 24, 1959 stipulation of settlement in *Zenn*, and the December 24, order vacating the injunction in *Breswick* and approving a separate Kirby settlement in *Breswick*, be declared null and void (or, in the alternative, that Kirby be enjoined from pleading the orders, etc. as *res judicata*); (2) That the

order of the New York Supreme Court in *Zenn* approving a separate Kirby settlement be declared null and void (or that Kirby be enjoined from pleading it as *res judicata*); (3) (similar relief as to the judgments of the New York Supreme Court dismissing the complaint); (4) That all releases on behalf of Alleghany delivered to Kirby in *Breswick* or *Zenn* be rescinded; (5) That the 1949-50 transaction be rescinded, or that damages measured by the value of a rescission be awarded.

The essential allegations of fraud were: (1) a corrupt agreement whereby Kirby was enabled to settle for far less than he should have had to pay, and from which Phillips and Ireland personally benefited; and (2) failure by Kirby to adduce or cause to be adduced before the New York Supreme Court or the United States District Court, or before Fitzsimmons as Referee and Special Master, facts material to an evaluation of Kirby's liability on claims arising out of the 1949-50 IDS stock transaction and of the fairness of the settlements proposed.

The District Court, Judge Dawson, held that there was diversity of citizenship, and that given diversity the court had jurisdiction over an independent action to prevent Kirby from claiming the benefits of the settlement, citing *Marshall* v. *Holmes*, 141 U. S. 589 (1891).[1] Judge Dawson then found that it had not been established that there was a secret agreement made by Phillips for his own benefit, and that it had not been shown that Kirby had committed a

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1 *Marshall* v. *Holmes* involved a holding that federal courts have jurisdiction to enter orders prohibiting a party from enjoying the benefits of a state court judgment obtained by fraud. The continued validity of that proposition is at least questionable—see *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 136 (1941)—but any settlement fraud was perpetrated not only on the state court, but also on the United States District Court which vacated the injunction in *Breswick*, and that fact was enough to give the District Court jurisdiction.

fraud upon the State court or its Referee in failing to produce certain documents at the hearings. *Alleghany Corporation* v. *Kirby,* 218 F. Supp. 164 (S. D. N. Y. 1963).

Appeal by Alleghany to this court was limited to the claim that Kirby should have disclosed certain facts during the settlement negotiations. The judgment of the District Court was affirmed, *Alleghany Corporation* v. *Kirby,* 333 F. 2d 327 (2 Cir. 1964). Judge Moore's opinion for the court was based in part on the principle that a director, defendant in a derivative suit, is not bound to disclose on his own initiative everything which might be relevant, and in part on the holding that evidence, in order to justify setting aside a settlement, ought to be at least of the character required for a new trial. Judge Friendly, in dissent, argued that the usual fiduciary obligation of a director should continue in a situation where he is charged with self-dealing. He also pointed out that even though personal dereliction by Kirby might not have been shown, Kirby, Young and Purcell were in a "joint venture" of sorts, and it appeared that Young and Purcell (who both testified at the hearings) had permitted the Referee to pass upon the settlement when they should have been aware that crucial and damaging evidence was not before him. (The evidence tending to show this had been excluded by Judge Dawson.) The evidence not before the Referee consisted of schedules of projected IDS income; the evidence excluded by Judge Dawson consisted of a note from Purcell to Young indicating that the projections were probably seen by the Alleghany directors. If the projections were seen by them, that would diminish the strength of the directors' principal arguments in defense to the *Zenn* actions: that they hadn't known IDS earnings would increase so dramatically.

[Two days after oral argument to the three-judge panel, the Kirby group regained control of Alleghany.]

After the panel decision, Stuart N. Updike, who had been representing Alleghany, wrote a letter to Chief Judge Lumbard asking guidance with respect to his firm's responsibility to Alleghany and its minority stockholders in view of the fact that Kirby had regained control of the corporation. [He also called the court's attention to the case of *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300 (1892)—referred to further below.] Subsequently Updike appeared before the Alleghany Board of Directors and answered questions about the case, whereupon the Board authorized the firm to take whatever steps were necessary to apply for a rehearing of the panel decision, with the suggestion that the case be heard *in banc*. The case was heard *in banc*, and this court split four-four, the result being affirmance of the District Court judgment. *Alleghany Corporation* v. *Kirby*, 340 F. 2d 311 (2 Cir. 1965).

Subsequent to the *in banc* decision, the Alleghany Board consulted both the Updike firm and Willkie, Farr, Gallagher, Walton & FitzGibbon (who are still representing Alleghany—at least in these actions) with respect to the advisability of petitioning the Supreme Court for a writ of certiorari, and with respect to the directors' responsibility toward the shareholders in making that decision. The "independent" Board members voted unanimously not to authorize a petition for a writ of certiorari. As might be expected, Alleghany shareholders (Holt and McMahon) then applied to the United States District Court for leave to intervene as a matter of right for purposes of carrying the litigation to the Supreme Court. Their application was denied by Chief Judge Ryan, who noted among other things that they had watched the litigation closely from the outset,

but sought to intervene only on the eve of the deadline for filing a petition for a writ of certiorari. His action was affirmed by this court, Judge Hays dissenting on the ground that the Alleghany Board was probably under the influence of Kirby when it decided not to authorize a petition to the Supreme Court. *Alleghany Corporation* v. *Kirby*, 344 F. 2d 571 (2 Cir. 1965).

At this point the Supreme Court, perhaps not fully aware of what it was getting into, on petition of Holt and McMahon issued writs of certiorari to review both the decision on the merits and the decision denying Holt and McMahon the right to intervene. After oral argument, the writs were dismissed as improvidently granted *sub nom. Holt* v. *Kirby*, 384 U. S. 28 (1966). Mr. Justice Black dissented, stating that he would reverse the judgments substantially for the reasons stated in Judge Friendly's dissent; Mr. Justice Harlan and Mr. Justice White dissented, believing that the cases should be adjudicated on the merits. It may be a good guess that the writs were dismissed on the theory that since the state court judgment was based entirely on the common law (cf. 340 F. 2d 311, 312, n. 1), and the *Breswick* action in the federal court did not involve the IDS transaction, there were no federal issues in the case.

The foregoing summarization of the *Zenn*, *Breswick*, and *Alleghany* litigation brings us to the litigation now before the court.

No. 31115 Smith, et al. v. *Alleghany Corporation, et al.*

Judge Kaufman said, with respect to the application of Holt and McMahon to intervene in *Alleghany* v. *Kirby*, "The aspect of [Alleghany's] litigious history presently before us . . . may occupy no more than a footnote when the

definitive chronicle is written . . ." 344 F. 2d at 572. This case is, in a sense, a footnote to a footnote.

Smith, et al. moved in the United States District Court for the Southern District of New York to intervene in *Alleghany Corporation* v. *Kirby* and to void the judgment entered, principally on the ground that the resumption of corporate control by Kirby two days after oral argument before the three-judge panel of this court foreclosed any justiciable controversy between parties having adverse legal interest. Heavy reliance was placed upon *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300 (1892), in which the Supreme Court, being advised that before argument control of both parties (corporations both) to the suit had come into the hands of the same persons, remanded the case without passing on the merits. Judge Weinfeld, noting that this court had had notice that control over the corporation had shifted, and that the *South Spring* case had been specifically called to the court's attention, denied the application.

Two points are made on the appeal.[2] The first contention is that the District Court lacked jurisdiction to consider the motion which appellants brought before it (under Rule 60(b)) without obtaining leave from this court, which had affirmed the judgment. A motion to vacate Judge Weinfeld's decision for want of jurisdiction was denied below. It is the rule in most circuits that where the action which the district court is *asked to take* under Rule 60(b) would disturb the judgment ordered by the appellate court's mandate, the district court lacks power to proceed until leave is obtained. 7 Moore, Federal Practice ¶60.30[2]. This court has not yet decided whether the rule should be estab-

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2 Appellant lists them as four, but the last three all go to the same basic point.

lished in this circuit—Judge Clark was very strongly of the view that it should not. See, generally Judge Friendly's opinion in *Schildhaus* v. *Moe*, 335 F. 2d 529, 530 (2 Cir. 1964). We need not resolve the question here in view of our determination on the merits.

Appellants' second point goes to the merits—it is that this court lost jurisdiction of *Alleghany* v. *Kirby* when the Kirby forces regained control of Alleghany, because there was no longer a justiciable controversy. However, the case heavily relied upon by appellants—*South Spring, supra*—involved a situation where the corporate litigants had both come under control of the same persons *before* oral argument, and it seemed clear that the controlling persons were, in effect, asking the Supreme Court for advice on how certain minority interests should be treated. Here, the situation was very different, for *Alleghany Corporation* v. *Kirby* was vigorously argued to this court by attorneys clearly representing adverse parties, and the Kirby takeover had no effect on the posture of the case as it was submitted to the court for decision. The only effect the takeover might have had would be on the submission on the reconsideration *in banc*, and on the decision not to seek review on certiorari. Be that as it may, the three-judge panel had jurisdiction, at least. Moreover, this court's determination, implicit in its decision, that there was a justiciable controversy is *res judicata*, and not open to collateral attack. *Swift & Company* v. *United States*, 276 U. S. 311, 326 (1928). Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940). Appellants contend that there was no adjudication of the constitutional "justiciable controversy" issue because the issue was not brought specifically to this court's attention. But the issue *might* have been raised, and that is what is crucial. See

Chicot County Drainage District v. *Baxter State Bank, supra.* The failure to seek certiorari, suspect though it may be (see Judge Hays' dissent in 344 F. 2d at 575), was cured by the Court's grant of certiorari on the application of the intervenors. There is no indication that the later dismissal of certiorari was on the ground that procedurally the case was not properly before the Court. The ruling of Judge Weinfeld that the determination was not open to collateral attack was correct.[3]

No. 31342 Smith, et al. v. *Fitzsimmons, et al.*

This is an appeal from a judgment in the District Court, Judge Bonsal, denying plaintiff-appellants' motion for summary judgment on the first count of their complaint, and granting defendants' motions for summary judgment. *Smith* v. *Fitzsimmons,* 264 F. Supp. 728 (S. D. N. Y. 1967).

Appellees raise the question of federal jurisdiction in the absence of complete diversity, two of the plaintiffs and Fitzsimmons being citizens of New York and there being no allegation that Alleghany does not have its principal place of business in New York. However, the second and third counts, attacking the judgments in federal court actions, may be rested on ancillary jurisdiction, 7 Moore Federal Practice ¶60.38, and the fourth, purportedly based on federal statutes, does not require diversity. The first count of the complaint seems to seek recovery only for the diverse plaintiff and we have no doubt that the district court would have permitted dismissal of this count as to the New York plaintiffs and if necessary a severance if sought. Moreover, the state law claim may well be retained even in the absence

3 Appellees also raise questions regarding appellants' status as intervenors and regarding the service of papers. We need not reach these questions.

of diversity as pendent to the second and third claims arising out of the same operative facts. *Hurn* v. *Oursler*, 289 U. S. 238 (1933); *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 722-25 (1966). We decline therefore to order dismissal of the first count at this stage for formal defect in allegations of diversity of the parties.

The first count of the complaint alleges that Fitzsimmons obtained his "compensation" for his services in *Breswick* in violation of Federal Rule 53(a), since he applied to the New York Supreme Court for compensation whereas Rule 53(a) provides: "The compensation to be allowed to a master shall be fixed by the court . . ." (meaning, presumably, the U. S. District Court). It is also alleged that the fee application was made while the *Zenn* orders were on appeal, by "collusion with Alleghany and Kirby," that Alleghany was improperly represented upon the fee application, and that Fitzsimmons made secret communications to Ireland (who acted as Alleghany's attorney on the fee application) in order to obtain the sum of $125,000 awarded as his fee for acting as Referee in *Zenn* and Special Master in *Breswick*.

The second count realleges count one and further alleges that Fitzsimmons violated §14 of the New York Judiciary Law in that he was "interested" in the matters at issue in *Zenn* and *Breswick*, and that Kirby's counsel wrote Fitzsimmons' Referee's report. (Excerpts from this court's decision in *Alleghany*—chiefly from Judge Friendly's dissent—are alleged to "show" that Fitzsimmons did not adequately discharge his duties as Referee insofar as the IDS transaction was concerned.)

The third count realleges the first two, and alleges Fitzsimmons' "hidden interest" in the outcome of *Zenn*—an openly avowed interest, plaintiffs claim. This is no differ-

ent from count two, except that it alleges a conspiracy among Fitzsimmons, Kirby and Alleghany. The fourth count alleges that all of the acts alleged in the prior counts constituted a conspiracy to deprive plaintiffs and all "absent shareholders" in *Zenn* of their rights under the 14th Amendment and 42 U. S. C. §§1983, 1985(2) and 1985(3) (the Reconstruction Civil Rights Acts). This last bizarre claim requires no discussion.

Appellants requested the following relief: (1) that Fitzsimmons be directed to repay to Alleghany $125,000, with interest; (2) that the 1950 IDS transaction be rescinded (or damages be assessed against Kirby, measured by the value of a rescission); (3) that the orders and releases of the New York Supreme Court in *Zenn* relating to Kirby and the IDS transaction be declared null and void; (4) that a judgment issue declaring that this court's judgment in *Alleghany* v. *Kirby,* and the District Court's judgment as it related to the IDS transaction, were procured by fraud and are null and void; (5) that Kirby be prohibited from participating as a stockholder in any recovery; (6) that an order issue declaring the continued existence of Alleghany to be against the interest of the public, the plaintiffs, and the minority stockholders; and (7) that Alleghany be dissolved.

So far as we can determine, in all this, appellants advance four basic claims: (1) it was improper for the state court to determine Fitzsimmons' fee for his services as Special Master rendered the U. S. District Court; (2) Fitzsimmons had a "hidden interest" in the outcome of *Zenn;* (3) there was collusion among Fitzsimmons, Alleghany and Kirby in the setting of Fitzsimmons' fee; and (4) Kirby's counsel wrote Fitzsimmons' report as Referee in *Zenn.*

(1) It appears that Judge Dimock intended that the New York Supreme Court take Fitzsimmons' services as Special Master into account in setting his overall fee, and that Fitzsimmons need not submit the fee to the federal court for consideration. Even in the peculiar circumstances of the interrelated *Zenn* and *Breswick* litigation, this would appear to be improper. Rule 53(a) F. R. C. P., provides: ". . . The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct . . ." See also 5 Moore, Federal Practice, ¶53.04(3) (2d ed. 1967).

The impropriety of letting the state court set the Special Master's fee is highlighted by the fact that Fitzsimmons' fee was paid entirely by Alleghany—the state court could not have required Kirby to pay any part of the fee, for Kirby had never been effectively made a party to the state litigation. (It appears to be assumed, however, that it was agreed among all of the parties that Alleghany should pay the fees.)

That the procedure by which Fitzsimmons' fee was set may have been improper does not mean, of course, that appellants can succeed now in obtaining any part of the fee back for Alleghany. Since the matter of Fitzsimmons' fee was submitted to the state court, and the parties in *Zenn* were free to object to the amount and to raise any issues pertaining to the fee award, the matter is now closed under the principle of *res judicata.* Appellants' reliance on *Hansberry* v. *Lee,* 311 U. S. 32 (1940) is misplaced, for the holding there was that where members of a purported class have potentially conflicting interests and are free either to challenge the alleged rights or to assert them, a judgment

in a suit brought by some members of the class will not be *res judicata* on the existence of those rights as to those class members not made parties to the litigation. The situation here, involving a stockholders' derivative suit, is very different, and is controlled by the rule that where the notice and representation are adequate a settlement decree in a derivative suit—a true class action—is *res judicata*. *Stella* v. *Kaiser*, 218 F. 2d 64, 65 (2 Cir. 1954) (dictum), cert. denied 350 U. S. 835 (1955). See also 3A Moore, Federal Practice, ¶23.11 (2d ed. 1967).

Appellants contend that since the error in allowing the state court to fix the fee can be characterized as lack of jurisdiction in the state court to take such an action, and the lack of jurisdiction was not raised as an issue in *Zenn*, *res judicata* is no bar. There is no question, however, but that the state court had jurisdiction of the subject matter and the parties in *Zenn;* moreover, this court has said that "With few exceptions a collateral attack upon the subject-matter jurisdiction of a court in which both parties have appeared is prohibited notwithstanding the failure of the parties to litigate the issue." *United States* v. *Eastport Steamship Corporation*, 255 F. 2d 795, 803 (2 Cir. 1958). Certainly a collateral attack on jurisdiction to set a master's fee should be even less favored than such an attack on jurisdiction over the subject matter of the litigation.

(2) Assuming that if Fitzsimmons had a "hidden interest" in *Zenn*, that would have violated Section 14 of the New York Judiciary Law (McKinney's Consol. Laws, c. 30) and would permit a collateral attack at this time both on the *Zenn* judgment and on the fee award, appellants' problem is that they offered no evidence in the District Court to show such a "hidden interest." A theory is offered that Fitzsimmons knew that if he rejected the settlement, the

amount of compensation he wanted would have been opposed by Alleghany under the control of Kirby. However, no evidence was offered to support this theory. So far as this point is concerned, then, summary judgment for the defendants was proper.

It may not be entirely clear from Judge Bonsal's opinion whether he was granting summary judgment under Rule 56 or dismissing the complaint under Rule 12. (There were motions under both rules.) As to the attack on Fitzsimmons' fee, it seems clear that there was a dismissal of the complaint, and this was certainly proper, since the issue was *res judicata* after the *Zenn* judgment. The problem arises with respect to allegations of Fitzsimmons' hidden interest, etc. Here the judge apparently ruled under Rule 56 and the judgment as to these allegations must be upheld under the Rule, since it appears that the parties had the opportunity to and did submit affidavits on the issues.

(3) The issue of "collusion" among Fitzsimmons, Kirby and Alleghany in the setting of Fitzsimmons' fee might not be *res judicata* before Judge Bonsal insofar as the allegations made by appellants differ from the grounds for attacking the fee already discussed under (1) *supra,* since Fitzsimmons was not a party in *Alleghany* v. *Kirby.* And the "collusion" theory, *if* supported by evidence, would at least raise the possibility not only of attacking the fee but also of attacking the *Zenn* judgment.

The allegations under the "collusion" theory center on the events of May and June 1960, surrounding the Fitzsimmons fee application. They are: (a) the fee application was filed before the rights of the litigants were finally determined; (b) Fitzsimmons selected Alleghany to pay his fee; (c) Fitzsimmons' visit to Ireland's office regarding the fee application was improper; and (d) the attorneys repre-

senting Alleghany on the fee application (the memorandum opposing the initial application was written by members of the Donovan firm, it is alleged) had a conflict of interest, in that they were Kirby's lawyers and thus were discouraged from contending that Kirby should pay part of Fitzsimmons' fee.

The problem with this theory, again, is the almost total absence of supporting evidence.

Substantiation of allegation c, relating to Fitzsimmons' visit to Ireland, might give color to the collusion theory, especially in light of a, b, and d. The claims seems to be that the visit was for the purpose of bargaining over the fee amount. Apparently recognizing that there was no evidence before the District Court on this point, appellants contend that the facts are shown in the record on what they characterize as "the Rule 19(c) application." But that record is not in this case, and it follows that summary judgment in the District Court on the pleadings and affidavits before it was proper.

(4) Once again, with the claim that Kirby's counsel wrote Fitzsimmons' report as Referee, there is no evidence whatever in the record substantiating the allegations. Summary judgment for defendants was proper.

There are two additional points raised to which we may give brief consideration. First, obviously there is no basis in the record to declare the continued existence of Alleghany against the public interest or to order its dissolution, even if the court in this action were thought to have the power in some manner to accomplish this. Second, although the appellees are undoubtedly correct in their thorough arguments as to the power of federal courts to tax attorneys' fees as costs against unsuccessful plaintiffs in some cases, it would seem clear that the decision whether or not

this be done rests within the discretion of the District Court, so far as the case before it was concerned. Cf. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (2 Cir. 1939). In any case, given the nature and proportions of the consequences of the highly questionable conduct of the fiduciaries underlying the long and tortuous course of this litigation, we would not be inclined to penalize the efforts of plaintiffs here to exhaust all possible avenues of relief, in the District Court or on appeal.

No. 28397 Alleghany Corporation v. *Kirby, et al.*

Robert L. Bobrick (attorney for Smith and Wiener—see *Smith* v. *Fitzsimmons, supra*—who are here characterized as "applicants") and Randolph Phillips applied on April 17, 1967 to the original panel in *Alleghany* v. *Kirby* and to the court *in banc* for an order "under Rule 19(c)" directing Smith and Wiener to conduct an investigation to aid this court in determining whether its judgment in *Alleghany* v. *Kirby* was procured by fraud. On May 16, 1967 the panel (Judges Moore, Friendly and Kaufman) ordered that the motion be referred to the panel considering the appeal in *Smith* v. *Fitzsimmons*.

An investigation such as the applicants request would be—applicants hope—preparatory to a motion under Rule 60(b), F. R. C. P., which provides for relief from a final judgment where fraud has been shown. Rule 19(c) of this court is by now irrelevant, since it merely directs that a motion addressed to a previous decision of the court be referred to the judges rendering the previous decision, and that has been done. If it is not settled in this Circuit that a Rule 60(b) motion should be first made to the Court of Appeals, rather than to the District Court which rendered the judgment, then it is possible that this application for

a pre-motion investigation should have been made to the District Court. See the discussion *supra*. But assuming that the application is properly before the court, we turn to the merits.

The basic claim here is that the judgment in *Alleghany* v. *Kirby* was procured by fraud, in that alleged fraud connected with *Zenn* and *Breswick* was known to various counsel in *Alleghany Corp.* v. *Kirby*, who did not report their knowledge to the District Court or this court.

There are two separate claims of fraud being made upon this application: (1) that Fitzsimmons had rendered "special services" to the Kirby, etc. interests in *Zenn* and *Breswick*, and demanded an additional $25,000 fee (over what Alleghany was ready to pay) on account of those services, that Kirby and Ireland knew of Fitzsimmons' "special interest" in the outcome in *Zenn*, and that one of Kirby's attorneys on the appeal in *Alleghany Corporation* v. *Kirby* knew the facts about Fitzsimmons' fee application but failed to disclose them; and (2) that Alleghany, under Kirby's control, knew that Fitzsimmons' report as Referee in *Zenn* had been written by Kirby's attorney, Daly.

Anticipating the objection that these matters were raised in *Smith* v. *Fitzsimmons* (and that, perhaps, the judgment there is *res judicata*), Bobrick and Phillips state that they have evidence to support their allegations which they were afraid to disclose in the District Court for fear of prejudicing the administration of justice by this court.

(1) As to the fee application, the "evidence" adduced breaks into two parts: (a) the admissions of Fitzsimmons and Ireland that they met with respect to the fee application, and the fact that a memorandum submitted by the Donovan firm in *Smith* v. *Fitzsimmons* supporting a motion to dismiss the complaint as to Kirby was "signed by no

identified member of the bar," but states (contrary to Fitzsimmons' affidavit, it is alleged) that Alleghany's counsel had "proffered" $100,000 for Fitzsimmons' services; and (b) a number of memoranda allegedly written by Phillips as he talked by telephone with Ireland in June 1960, and was informed by Ireland of the progress of the fee application.

(a) The fact that Fitzsimmons and Ireland admit having met with respect to the fee, standing alone, means very little if anything. While it can be argued that Fitzsimmons *should* have limited himself to discussing the fee with Justice McGivern, there is nothing in the fact of the Ireland-Fitzsimmons meeting to indicate that the amount of the fee was determined by the parties rather than by the court. As to the $100,000 allegedly "proffered" by Alleghany, the circumstances seem to be adequately explained by the affidavit of Robert M. Loeffler, a partner in the Donovan firm, submitted in opposition to this application. It appears from that affidavit that Justice McGivern asked Loeffler what he thought a proper fee would be, and that Loeffler, without consulting Alleghany, suggested $100,000; Justice McGivern then consulted Fitzsimmons, who stuck to his $150,000 figure; Ireland subsequently authorized a fee of not more than $125,000, and Justice McGivern approved that figure. If this had all gone on before the Referee's report was submitted, there might well be cause for an investigation, but since the report had long before been submitted, it would seem that the applicants must submit something more in the way of evidence to warrant reopening the matter.

(b) Recognizing the need for something more, the applicants have come up with Phillips' three memoranda. The first of these indicates little that is new, except that

allegedly Fitzsimmons told Ireland to "throw up a heavy smokescreen," whatever that may mean. The second memorandum is more interesting, for it indicates that Fitzsimmons, in discussing the fee with Ireland, allegedly had said that he wanted to remind Kirby of "special services." The third memorandum indicates that the alleged "special services" consisted of Fitzsimmons' "general perspective toward the whole case," and of the fact that he "fell over backwards" when there were cries for Kirby's testimony; he "strained" to let Kirby off, and "to say the least," took a "very charitable attitude toward the IDS transaction."

The applicants realize that these memoranda require corroboration to be of any value, and Phillips states in his affidavit on this application that he was advised by counsel against any public disclosure of the memoranda until corroboration could be obtained. It is now claimed that the memoranda are corroborated by the admissions of Fitzsimmons and Ireland that they met with respect to the fee, by the opinions of Judges Moore and Friendly in *Alleghany* v. *Kirby*, both of which recognized (Judge Friendly in considerably stronger terms) that the evidence did not compel the result reached by Fitzsimmons, and by the fact that subsequent to the hearings before Fitzsimmons (in which Kirby was excused from testifying on grounds of illness) Kirby had appeared as a witness in judicial and administrative proceedings. The only possibly significant point among these is the last, and even that loses its impact when it is considered that the hearings before Fitzsimmons took place in 1955, and Kirby's subsequent appearances were in 1960-65.

All of the claimed "corroboration" was available before the District Court proceedings in *Smith* v. *Fitzsimmons*, yet the Phillips memoranda were not made available to that

court. Ireland, in his affidavit on this application, categorically denies the statements attributed to him in the memoranda, and Fitzsimmons, in his affidavit, denies having made any of the statements attributed to him. We find no grounds for reopening, on any such showing, issues once fully litigated.

(2) The "evidence" to support the claim that Daly wrote the Referee's report is even less substantial than that supporting the claims of improper conduct surrounding the fee application. The allegation is, specifically, that court reporter Louis G. Schwartz, to whom the Referee's report was dictated, has "informed a member of the bar of this Court" that Daly wrote the report, but has stated that he would deny that he said such a thing if he were taxed with the statement. The "evidence" is a bill submitted by Schwartz to Alleghany under date of July 31, 1956 for services in typing the report. At that time, Alleghany was under the control of Kirby, and was in favor of the settlement. In September 1957, Schwartz called the bill to the attention of David W. Wallace, an Alleghany attorney, who then wrote Schwartz that it would be improper for Alleghany to pay the bill, since the report had not yet been rendered. The claim is, of course, that Schwartz had submitted the bill to those to whom he had rendered the services, and that this indicates that somebody other than Fitzsimmons had dictated the report.

Both Fitzsimmons and Daly deny the allegation. Schwartz states that the report was dictated to him by John Mooney, an attorney from Fitzsimmons' office, and that it was in accord with the customary practice of his office in protracted reference proceedings to bill Alleghany during the course of the proceedings before Fitzsimmons (they had billed Alleghany, and were paid by Alleghany,

for the transcript of the proceedings). He adds the interesting statement that in June 1966, Phillips told him that the report had been prepared by Daly, and insisted to him that the report must have been dictated by Daly; Schwartz told Phillips that although he had good reason to be angry at Daly, he had no intention of joining in a lie against Daly to say that Daly had dictated the report.

At most, the application stands on a porous foundation and in any case our consideration of it is barred by reason of the litigation of the same issues in *Smith* v. *Fitzsimmons* and their determination by Judge Bonsal on summary judgment sought by plaintiffs themselves. All the matter put forth in support of the so-called 19(c) motions was or could have been presented to Judge Bonsal and may not be held back and subsequently used as the basis for relitigation of the same issues. The motions must be, and are denied.

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Memorandum Opinion of Bonsal, *D.J.*

Defendants Kirby, Fitzsimmons and Alleghany Corporation move pursuant to Rule 12 and Rule 56 of the Federal Rules of Civil Procedure to dismiss the complaint, and plaintiffs move for summary judgment pursuant to Rule 56 on "count" one of the complaint. Defendants' motion to dismiss the complaint is granted and plaintiffs' motion for summary judgment is denied.

In his farewell address to the Congress of the United States, General MacArthur remarked that, "Old soldiers never die; they just fade away." The plaintiffs, stockholders of Alleghany Corporation (Alleghany), champion the notion that old lawsuits never die; nor do they fade away. They seek to resuscitate a long and bitter litigation in which their corporation sought unsuccessfully to set aside a prior settlement of a derivative action instituted by other stockholders of Alleghany against Kirby and others. *Alleghany Corp.* v. *Kirby,* 218 F. Supp. 164 (S. D. N. Y. 1963), *aff'd,* 333 F. 2d 327 (2d Cir. 1964), *aff'd en banc,* 340 F. 2d 311 (1965), *cert. dismissed as improvidently granted, sub nom. Holt* v. *Alleghany Corp.,* 384 U. S. 28 (1966).

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The history of the prior litigation and the IDS transaction which led to it are set forth in full in Judge Dawson's opinion reported at 218 F. Supp. 164 and in the opinions in the Court of Appeals of Judges Moore, Kaufman and Friendly reported at 333 F. 2d 327, and therefore need no repetition here. However, a comment of Judge Moore is particularly appropriate to the present action:

> "Were every settlement which had been carefully examined and judicially approved to be vacated at the

behest of some subsequent corporate champion who brings forth certain documents which he claims might have so influenced the court that the settlement might not have been approved, there would be no finality to any litigation whether by settlement or by judgment." (333 F. 2d 327, at 334)

The champions here are stockholders of Alleghany who now seek to step in where their corporation failed. They have no documents to offer which might have influenced the New York Supreme Court's approval of the 1958 settlement. (*Zenn* v. *Anzalone*, 17 Misc. 2d 897, 191 N. Y. S. 2d 840 (Sup. Ct. N. Y. Co. 1959).) Instead, plaintiffs baldly assert, without factual support, that the defendant Fitzsimmons (the Referee in *Zenn* and the Special Master in this Court in *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397 (S. D. N. Y. 1955)) had an "interest" in approving the *Zenn* settlement, was guilty of allegedly improper conduct,

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and generally was guilty of fraud.

The three stockholder plaintiffs are Morris Smith, alleged to be a citizen of Pennsylvania; Elizabeth Most (who appears to be the wife of plaintiffs' attorney) and David Wiener, alleged to be citizens of New York. Alleghany is a Maryland corporation having its principal office in New York, and defendant Fitzsimmons is alleged in the complaint to be a citizen of New York, so diversity of citizenship exists only with respect to plaintiff Smith. According to the complaint, Smith has been the beneficial owner of five shares of common stock of Alleghany since 1959; Most, the beneficial owner of 20 shares of common stock since

1962; and Wiener, the beneficial owner of 10 shares of preferred stock since 1960 and 50 shares of common stock since 1956. It should be noted parenthetically that none of the plaintiffs were stockholders of Alleghany in 1955 when notice of the proposed settlement in *Zenn* was sent to all stockholders (333 F. 2d 327, at 329) and, consequently, their claim that they received no notice of the settlement finally approved in 1959 and of the $125,000 allowance to Fitzsimmons is lacking in merit. Similarly, plaintiffs' alleged lack of notice of the *Alleghany* v. *Kirby* litigation does not aid them here, particularly in view of the evi-

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dence that Randolph Phillips, a principal figure in *Alleghany* v. *Kirby*, is their "consultant" in this lawsuit.[1]

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[1] In the proceedings in *Alleghany* v. *Kirby* before the Supreme Court resulting in the dismissal of writs of certiorari as improvidently granted (*Holt* v. *Alleghany Corp.*, 384 U. S. 28 (1966)), a brief was filed for Randolph Phillips as *amicus curiae* urging reversal.

An affidavit submitted in support of the motion by Kirby to dismiss the complaint includes a copy of a letter dated May 31, 1966 from Mr. Phillips to Ira Leeman, an attorney, enclosing an authorization form for use by Mr. Leeman's client, Mr. Colombo, presumably a stockholder of Alleghany. The authorization form would authorize Mr. Bobrick, the attorney for the plaintiffs herein, to file a complaint in Mr. Colombo's name, and Mr. Phillips' letter states that, "it will be necessary for Mr. Colombo to meet Mr. Bobrick and verify that he is a stockholder and has been one since at least 1951." The letter goes on to say that "Mr. Bobrick, incidentally, is the husband of Dr. Most [one of the plaintiffs in this action] as well as her attorney, and I [Phillips] am their consultant."

Mr. Colombo also received a circular letter and proxy statement addressed to the stockholders of Alleghany from Dr. Elizabeth Most, dated May 12, 1966, the purport of which was to solicit the stockholders to institute legal proceedings to set aside the 1950 IDS

Memorandum Opinion of Bonsal, D.J.

In the first "count" of their complaint, plaintiffs allege that defendant Fitzsimmons applied for, in *Zenn*, and pur-

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suant to an order of the Supreme Court, New York County (McGivern, J.), received compensation in the amount of $125,000 for his services as Referee in *Zenn* and as Special Master in *Breswick*. Plaintiffs seek to recover on behalf of Alleghany the $125,000 paid to Fitzsimmons and seek to have the order declared null and void. Plaintiffs argue that this court has jurisdiction to set aside an order of the State court because of Fitzsimmons' alleged misconduct in connection with his allowance and because under Rule 53(a) of the Federal Rules of Civil Procedure the State court had no power to make an allowance to Fitzsimmons for his services as Special Master in *Breswick*.

The alleged acts of misconduct are: first, that Fitzsimmons consulted secretly with Ireland, an attorney representing Kirby and Alleghany, and then communicated the fact of his "secret" consultation to Judge McGivern *ex parte;* second, that due to the conflicting interests of Alleghany and Kirby with respect to who would pay Fitzsimmons' compensation, the representation of Alleghany and Kirby by the same attorneys deprived Alleghany of

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transaction, and which state, after referring to *Alleghany* v. *Kirby*, that,

> "The case therefore is terminated unless new evidence is found or new legal issues presented to cause its re-opening. We propose to retain new attorneys and experts for that purpose."

The new attorney is Dr. Most's husband; the consultant is the same Mr. Phillips; and the new "evidence" is defendant Fitzsimmons' alleged fraud.

independent counsel; and third, that Fitzsimmons based his application for compensation as Referee and Special

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Master on the value of the ultimate settlement in *Zenn*.

Whether the question of setting aside the State court order granting Fitzsimmons compensation is governed by State law (see *Alleghany* v. *Kirby*, 218 F. Supp. 164, 183-84) or by Federal law because of plaintiffs' argument based on Rule 53 (see 7 Moore, Federal Practice ¶60.37(3), at 634 (2d ed. 1966)), plaintiffs have failed to state a claim upon which relief can be granted.

The allegations of misconduct relate to matters that were known by the litigants and by the court in *Zenn*. Consequently, there is no basis for an independent action in equity. See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944); *Marshall* v. *Holmes*, 141 U. S. 589 (1891); *United States* v. *Throckmorton*, 98 U. S. 61 (1878); *Crouse* v. *McVickar*, 207 N. Y. 213 (1912); *In re Adoption of Brundage*, 134 N. Y. S. 2d 703 (Sup. Ct. Orange Co. 1954), *aff'd without opinion*, 143 N. Y. S. 2d 611 (2d Dept. 1955).

Plaintiffs' argument based on Rule 53(a) amounts to no more than a claim that the State court committed error in its award of compensation to Fitzsimmons. Even if the State court was wrong in considering Fitzsimmons' services as Special Master when determining the amount of

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the allowance to be made (see *In re Gilbert*, 276 U. S. 6 (1928); *cf. Leiman* v. *Guttman*, 336 U. S. 1 (1949); *Brown* v. *Gerdes*, 321 U. S. 178 (1944)), relief was available by appeal seeking a reduction in the allowance and a direction

that Kirby pay part or all of any allowance that was made. See *Sheriff* v. *Heyman*, 23 A. D. 2d 555, 256 N. Y. S. 2d 641 (1st Dept.), *aff'd without opinion*, 16 N. Y. 2d 944, 264 N. Y. S. 2d 928 (1965); *Cross Properties, Inc.* v. *Gimbel Brothers, Inc.*, 15 A. D. 2d 908, 225 N. Y. S. 2d 1019 (1st Dept. 1962). Under neither Federal nor State law can an independent action be maintained for the purpose of reviewing and correcting error in a final judgment. *Ackerman* v. *United States*, 340 U. S. 193 (1950); *United States* v. *Borchers*, 163 F. 2d 347 (2d Cir.), *cert. denied*, 332 U. S. 811 (1947); *Herpe* v. *Herpe*, 225 N. Y. 323 (1919); *Fisher* v. *Hepburn*, 48 N. Y. 41 (1871); *West 158th Street Garage Corp.* v. *State*, 256 App. Div. 401, 10 N. Y. S. 2d 990 (3d Dept. 1939).

The second "count" of the complaint (charging defendant Fitzsimmons with violating Section 14 of the New York Judiciary Law) alleges that he was "interested" in the matters which were at issue in *Zenn* and *Breswick*, that Kirby's counsel wrote the report Fitzsimmons submitted as Referee in *Zenn*, and sets forth various quotations from the Court

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of Appeals' opinions in Alleghany for the purpose of showing that the approval of the *Zenn* settlement in *Alleghany* was a close question. Based on the allegations of the second "count," plaintiffs seek a judgment rescinding the 1950 IDS transaction which was the subject matter of the settlement in *Zenn*, or an award of damages against Kirby "measured by the value of a rescission of said transaction."

The third and fourth "counts" of the complaint are largely a reiteration of the allegations in the first two "counts," with the addition of allegations of a conspiracy

and of "overt acts" and allegations asserting violation of the rights of the plaintiffs "and the absent shareholders" of Alleghany under the 14th Amendment and 42 U. S. C. A. 1983, 1985(2) and 1985(3). Based on these allegations, plaintiffs seek an order directing Kirby to reimburse Alleghany for its damages; a judgment declaring null and void the orders and judgments of the State court in *Zenn* and the releases delivered to Kirby as a result thereof; a preliminary and permanent injunction prohibiting Kirby from relying on the orders or judgments in *Zenn* to plead the defenses of *res judicata* or collateral estoppel; a declaratory judgment that the judgments of this court, the Court of Appeals and the Supreme Court in *Alleghany* v. *Kirby*

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were procured by fraud; and an order prohibiting Kirby from participating as a stockholder in any way in the damages adjudged payable to Alleghany.[2]

By these allegations of misconduct on the part of Fitzsimmons, plaintiffs seek to reopen the extended litigation

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[2] In their demand for relief, plaintiffs seek a declaratory judgment that the continued existence of Alleghany is against the public interest and the interest of minority stockholders and a judgment requiring the dissolution of Alleghany and the distribution of its assets on a fair and equitable basis. Under Maryland law there is no basis for this relief in the present action. See Art. 23 Maryland Code Ann. §§76-83; *Coffman* v. *Maryland Pub. Co.*, 167 Md. 275, 173 Atl. 248 (1934); *Howeth* v. *Coulbourne Bros. Co.*, 115 Md. 107, 80 Atl. 916 (1911). In any event, since a Maryland corporation is involved, the relief could not be sought in the New York state courts (see *Langfelder* v. *Universal Laboratories, Inc.*, 293 N. Y. 200 (1944); *Adolph Meyer, Inc.* v. *Florists Telegraph Delivery Ass'n*, 36 Misc. 2d 566, 232 N. Y. S. 2d 913 (Sup. Ct. Queens Co. 1962)) and consequently cannot be sought in this court. See *Weiss* v. *Routh*, 149 F. 2d 193 (2d Cir. 1945).

in *Alleghany* and to relitigate the question of whether the settlement in *Zenn* was procured by fraud. This was the same question Judge Dawson had before him in *Alleghany*, originally instituted as a derivative action in 1962 when plaintiffs Smith and Wiener were stockholders of Alleghany, and the attempt to litigate it again is barred by the

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doctrine of *res judicata*. As stockholders in Alleghany, plaintiffs are bound by the earlier litigation in Alleghany (*E.g., Reiter* v. *Universal Marion Corp.*, 299 F. 2d 449 (D. C. Cir. 1962); *Dana* v. *Morgan*, 232 Fed. 85 (2d Cir. 1916); *Phillips* v. *Bradford*, 228 F. Supp. 397 (S. D. N. Y. 1964); *Grant* v. *Greene Consolidated Copper Co.*, 169 App. Div. 206, 154 N. Y. S. 596 (1st Dept. 1915), *aff'd without opinion*, 223 N. Y. 655 (1918)) and the bar of *res judicata* extends to all matters which could have been litigated as well as to all matters actually litigated.[3] *E.g., Nichols* v.

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[3] Plaintiffs argue that the bar of *res judicata* does not apply to their action because it is sanctioned under Rule 60(b) F. R. Civ. P. as an independent action in equity. Reliance is placed on such cases as *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., supra*, and others cited in 7 Moore, Federal Practice ¶60.18 (8) (2d ed. 1966). Plaintiffs' conclusory allegations that Fitzsimmons had a "hidden interest" in approving the *Zenn* settlement and was biased in favor of Kirby and that Kirby's counsel wrote Fitzsimmons' report, will not support the attempt here to circumvent the bar of *res judicata*. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399 (1923); *Nichols* v. *Alker*, 235 F. 2d 246 (2d Cir. 1956).

Although plaintiffs state that the basis for their action is fraud perpetrated in the *Alleghany* litigation, in substance their claim is that new evidence has been discovered which would have changed the result in *Alleghany* had it been introduced. However, no showing has been made that this "newly discovered evidence" could not have been presented in the original *Alleghany* litigation (compare *Marshall* v. *Holmes, supra; United States* v. *Throckmorton, supra*),

Alker, 231 F. 2d 68 (2d Cir.), *cert. denied,* 352 U. S. 829 —583— (1956); *Stella* v. *Kaiser,* 218 F. 2d 64 (2d Cir. 1954), *pet. for rehearing denied,* 221 F. 2d 115 (1955), *cert. denied,* 350 U. S. 835 (1955); *Wolcott* v. *Hutchins,* 245 F. Supp. 578 (S. D. N. Y.), *aff'd,* 365 F. 2d 833 (2d Cir. 1966); *Phillips* v. *Bradford, supra.*

Despite the years of litigation involved in *Alleghany, Zenn* and *Breswick,* plaintiffs seek to again challenge the 1950 IDS transaction which was the subject of the *Zenn* settlement. A reading of the three opinions of the panel in the Court of Appeals in *Alleghany* v. *Kirby* (333 F. 2d 327) where the panel split 2-1 in favor of affirming Judge Dawson, and the subsequent affirmance *en banc* by a 4-4 vote, indicates that the *Zenn* settlement was sustained in *Alleghany* v. *Kirby* by a close margin. Plaintiffs would tip the balance against the settlement by the straw of defendant Fitzsimmons' alleged fraud. However, plaintiffs offer nothing to support their charge which is emphatically denied by Fitzsimmons. Contrary to the complaint, the record is clear that Alleghany, through its attorneys, did actively contest the matter of Fitzsimmons' compensation. The opinions in the District Court and the Court of Appeals in *Alleghany* v. *Kirby* clearly demonstrate that the recom-

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and after one full opportunity for pre-trial discovery (*Alleghany* v. *Kirby,* 218 F. Supp. 164, 169) no reason appears for permitting depositions to be taken once again. Even if plaintiffs' "new evidence" would give them a better prospect of success, the reopening of a final judgment would not therefore be warranted. *Pickford* v. *Talbott,* 225 U. S. 651 (1912).

mendations of defendant Fitzsimmons as Special Master received the most careful scrutiny.

Judge Moore's statement previously quoted is particularly apt here. Alleghany having had its day in court, was unsuccessful in its effort to set aside the *Zenn* settlement. Its stockholders are bound by the result. Otherwise, "there would be no finality to any litigation, whether by settlement or by judgment."

This action which seeks to reopen the Alleghany litigation on the basis of conclusory and unsupported allegations of fraud hardly appeals to the conscience of a court of equity, particularly if there has been a solicitation of Alleghany stockholders, participated in by Mr. Phillips, for the purpose of bringing the action.

Defendants Fitzsimmons, Kirby and Alleghany's motion to dismiss the complaint is granted and plaintiffs' motion for summary judgment on the first "count" of their complaint is denied.[4]

Settle order on notice.

Dated: New York, N. Y.
February 7, 1967.

DUDLEY B. BONSAL
U.S.D.J.

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[4] The defendants Fitzsimmons, Kirby and Alleghany have moved to strike interrogatories served upon them by the plaintiffs. Since the defendants' motion to dismiss the complaint has been granted, the defendants' motions to strike interrogatories have also been granted, though they will become moot on the entry of the order herein.

UNITED STATES COURT OF APPEALS

Second Circuit

Rec'd 6/11/68

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of June, one thousand nine hundred and sixty-eight

Allegheny Corporation,
Plaintiff-Appellant,
v.
Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby,
Defendants-Appellees.

Morris Smith and David Wiener,
Applicants-Appellants,
v.
Allegheny Corporation,
Plaintiff-Appellee,
Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby; Fred M. Kirby and Charles T. Ireland, Jr.,
Defendants-Appellees.

Morris Smith and David Wiener, et al.,
Plaintiffs-Appellants,
v.
Robert J. Fitzsimmons, et al.,
Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellants Morris Smith and David Wiener, and appellant Randolph Phillips pro-se to vacate the opinion and judgment filed herein on May 8, 1968

be and it hereby is denied.

A. DANIEL FUSARO
Clerk.

* * * * * *

BEFORE: HON. Henry J. Friendly

HON. [redacted]

[redacted]

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and sixty-eight.

Present: HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges,
HON. EDWARD T. DIGNOUX,
District Judge.

DOCKETED AS
A JUDGMENT 69,399
ON June 27, 1968
AT M.

U.S. DISTRICT COURT
FILED
JUN 27 1968
S.D. OF N.Y.

Morris Smith and David Wiener, individually and on their own behalf and that of all other shareholders of Allegheny Corp., similarly situated and derivatively on behalf of Allegheny Corp.,
Plaintiffs-Appellants,

v.

Robert J. Fitzsimmons; Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby; and Allegheny Corp.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellees Robert J. Fitzsimmons and Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the property of Allan P. Kirby.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of May one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH, Circuit Judges,

HON. EDWARD T. GIGNOUX, District Judge.

60 Civ 3511

~~Circuit Judges~~

ENTERED AS
A JUDGMENT
ON June 27, 1968
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U.S. DISTRICT COURT FILED JUN 27 1968 S.D. OF N.Y.

Morris Smith and David Wiener,

Applicants-Appellants,

v.

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Plaintiff-Appellee,
Allan P. Kirby, Jr., and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby; Fred M. Kirby and Charles T. Ireland, Jr.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellee, Alleghany Corporation and to the defendants-appellees, Allan P. Kirby, Jr., et al.

A. DANIEL FUSARO
Clerk

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of May , one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,

HON. J. JOSEPH SMITH,
Circuit Judges,

HON. EDWARD T. GIGNOUX,
District Judge.

~~Circuit Judges~~

Alleghany Corporation,

Plaintiff-Appellant,

v.

Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr., and Fred M. Kirby,

Defendants-Appellees.

A motion having been made herein by counsel for applicants David Wiener and Morris Smith and by Randolph Phillips pro se to direct said applicants to conduct an investigation to aid this court in determining if its judgment was procured by fraud upon the court and "absent parties"

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 2 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

—against—

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY; CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENTS GUARDIANS OF THE PROPERTY OF ALLAN P. KIRBY AND RESPONDENT CHARLES T. IRELAND, JR. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 462

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Respondents.

BRIEF OF RESPONDENTS GUARDIANS OF THE PROPERTY OF ALLAN P. KIRBY AND RESPONDENT CHARLES T. IRELAND, JR. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, as stockholders suing in the right of Alleghany Corporation ("Alleghany"), seek to appeal here from a denial by the United States Court of Appeals below of three separate attempts[1] by petitioners to relitigate for the

[1] Petitioners randomly discuss events from different ones of those proceedings as though describing the same proceeding, when in fact, for example, the discussion at pp. 10-11 of the petition refers to Docket No. 28397, while the continued discussion at pp. 12-14 of the petition refers to earlier events in Docket No. 31115.

third, fourth and fifth times the propriety of an exchange of stock of Investors Diversified Services, Inc. ("IDS") owned by Alleghany for stock of Alleghany owned by Allan P. Kirby ("Kirby") in 1949-1950. The propriety of that transaction was originally adjudicated between the same parties in the Supreme Court of New York, *Zenn* v. *Anzalone*, S. Ct., N. Y. Co., 7244/1954. Thereafter it was put in issue a second time in the Federal courts below and in this Court in *Alleghany Corp.* v. *Kirby*, 218 F. Supp. 164 (S. D. N. Y. 1963), *aff'd*, 333 F. 2d 327 (2d Cir. 1964), *aff'd on rehearing en banc by an equally divided court*, 340 F. 2d 311 (1965), *cert. dismissed as improvidently granted after oral argument sub nom. Holt* v. *Kirby*, 384 U. S. 28 (1966).

The History of This Litigation and the Proceedings Below

The original (*"Zenn* (State)") litigation in the New York State court of the issue of the propriety of the 1949-1950 transaction between the corporation and its officers was a consolidation of ten shareholder actions, eight of which were commenced in the spring of 1954, brought representatively and derivatively on behalf of Alleghany against Kirby and eighteen other defendants[2] (Pet. Appx. 2134).[3] After five years of litigation that action[4] was settled

[2] At about the same time that Zenn (State) was commenced, a similar derivative action entitled Zenn v. Anzalone (hereinafter "Federal Zenn") was commenced in the United States District Court for the Southern District of New York. After some initial depositions, Federal Zenn remained pending and unprosecuted for twelve years and was dismissed by the District Court on August 9, 1966 for lack of prosecution (Pet. Appx. 2134).

[3] References in this brief to the opinions of the Court of Appeals and of the District Court in Appeal Docket No. 31342 hereinbelow

in consideration of the payment of $3 million plus return of control of IDS to Alleghany. The adequacy of the settlement was investigated at length in hearings before a Referee, Robert J. Fitzsimmons ("Fitzsimmons"), appointed by the New York Supreme Court, and, as later supplemented, was thereafter judicially approved by that court (17 Misc. 2d 897, 191 N. Y. S. 2d 840 (S. Ct., N. Y. Co. 1959); Pet. Appx. 2134-39). All Alleghany shareholders were notified of the proposed terms of the settlement as of the date of its proposal in 1955 and were advised of their right to attend a hearing with respect to it. As the District Court in *Smith* v. *Fitzsimmons,* Docket No. 31342 below, found, "none of the plaintiffs [herein] were stockholders of Alleghany in 1955," and hence "their claim that they received no notice of the settlement finally approved in 1959 . . . is lacking in merit" (Pet. Appx. 70a).

The hearings conducted by the Referee resulted in the marking of 480 exhibits and the production of 4600 pages

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are made to the appendices in the petition, thus: *e.g.*, "Pet. Appx. 2134; Pet. Appx. 75a," etc. References to the decisions of Judge Weinfeld in Appeal Docket No. 31115 are made to the appendices in this brief, thus: "A1 *infra*; B1 *infra*," etc. References to the opinion of the District Court in Alleghany Corp. v. Kirby are made to the official report of that opinion in 218 F. Supp. References to the records on appeal hereinbelow are made to the consecutively numbered pages therein, thus—"Rec. in 31115 at p. 10," etc.

[4] The settlement covered both the Zenn (State) action and a similar derivative action entitled Breswick v. Briggs ("Breswick"), then pending in the United States District Court for the Southern District of New York. The Federal Breswick action included many of the same claims against the same defendants as were contained in Zenn (State), but did not include the claim on the 1949-1950 IDS stock transaction sought to be reopened herein (Pet. Appx. 2134-35, 2138). Robert J. Fitzsimmons, who had been appointed Referee in Zenn (State), was also appointed Special Master in Breswick for the purpose of examining into the adequacy of the settlement negotiations as they affected the Breswick plaintiffs (Pet. Appx. 2135-36).

of testimony taken from 18 witnesses, seven of whom were proponents and 11 objectants to the proposed settlement (218 F. Supp. at 171). On December 28 and 29, 1959 the New York Supreme Court approved and confirmed the stipulations of settlement that finally had been agreed upon between all the parties, and subsequent thereto $3 million was paid by Kirby and certain other defendants to Alleghany, control of IDS was returned to Alleghany, general releases were delivered to all defendants and the action was dismissed (Pet. Appx. 2138-39).

None of the petitioners herein was a party to that litigation. Indeed, as found by the District Court in No. 31342 below, petitioners Smith and Wiener were not even stockholders at the time the settlement was approved (Pet. Appx. 70a). Petitioner Randolph Phillips, though also not a party, was directly involved as a prime mover in the *Zenn* litigation. He was a "consultant" both to the plaintiffs in *Breswick* (see footnote 4, *supra*) and to an Alleghany stockholder who intervened as an objectant in the settlement hearings before the Referee in *Zenn* (State) (218 F. Supp. at 171). The final settlement agreement between Alleghany and Kirby in which Phillips (and his objectant-client) acquiesced was the result of Phillips' own efforts and negotiations (173 F. Supp. at 173-75, 177-78). Unquestionably he had "a very important position in the litigation," so much so that "his reaction to a settlement proposal might in fact prove decisive" (218 F. Supp. at 175).

The second attempt to litigate the same issue between Alleghany and Kirby began on September 8, 1960, when the Murchison brothers—who had been co-defendants and co-

settlors with Kirby in the prior litigation and who thereafter had a falling out with him—brought a derivative suit on behalf of Alleghany against Kirby and others to set aside the *Zenn* settlement (upon the Murchisons' gaining control of Alleghany the following year, they caused Alleghany to be substituted as party-plaintiff in that lawsuit, captioned *Alleghany* v. *Kirby*) and to cause Alleghany to relitigate the 1949-1950 transaction as to Kirby (Pet. Appx. 2140). In that action it was asserted that the settlement of Kirby's liability in *Zenn* (State) had been procured by fraud in the form of an alleged secret and corrupt agreement between Kirby and Randolph Phillips whereby Phillips, the motive force behind the litigation, was allegedly bribed to agree to the settlement, and the alleged failure by Kirby to adduce facts at the Referee's hearings held in *Zenn* (State) bearing upon the 1950 IDS exchange transaction (218 F. Supp. at 167; Pet. Appx. 2141).

Alleghany v. *Kirby* was tried in the District Court for the Southern District of New York from April 1, 1963 to April 19, 1963. In the course of trial, 2,474 pages of testimony were taken and 222 exhibits admitted in evidence (218 F. Supp. at 169). Petitioner Phillips, then a co-defendant with Kirby, vigorously defended the bona fides of the settlement of the 1949-50 transaction (Trial transcript pp. 1178-79, 2424-25 in *Alleghany* v. *Kirby,* S. D. N. Y./60 Civ. 3511). At the conclusion of a three-week trial, the trial court held that "plaintiff completely and utterly failed to establish" its case (218 F. Supp. at 187), found the settlement free from fraud, and dismissed the complaint. On appeal, the Court of Appeals for the Second Circuit affirmed 2-1, and again on rehearing (which by that time had been sought by a new Kirby management of Alleghany),

affirmed 4-4. Alleghany thereupon directed its counsel to discontinue any further efforts to seek review (Pet. Appx. 2142-43).

However, counsel who had theretofore represented the anti-Kirby management of Alleghany thereupon sought and obtained a writ of certiorari from this Court to review the charge of fraud in the procurement of the *Zenn* judgment and settlement, in the name of two newly-arrived stockholders of Alleghany *sub nom. Holt* v. *Kirby*. Their petition represented that various far-flung issues of national importance were involved, and this Court granted its writ (Pet. Appx. 2143-44). Briefs containing in excess of 350 pages and an appendix consisting of 2,392 printed pages were submitted to this Court and oral argument had thereon (Oct. Term 1965, Docket No. 132). This Court, voting 4-3, then dismissed its writ of certiorari as improvidently granted (384 U. S. 28).

In the interim between the Court of Appeals' decision in *Alleghany* v. *Kirby* and this Court's consideration on review of that decision *sub nom. Holt* v. *Kirby*, petitioner Phillips in 1964 submitted his affidavit to the New York Supreme Court in support of an application for attorneys' fees in *Zenn* (State), award of which had been postponed pending disposition of the *Alleghany* v. *Kirby* litigation. In that affidavit Phillips again praised the settlement. The court on May 7, 1965 awarded total fees of more than $1.8 million, from which Phillips received $392,000 plus expenses (Affid. of J. E. Tobin dtd 2/20/68, p. 17, in Ct. App. Docket No. 28397 below).

As soon as fees had been awarded, Phillips attacked the same settlement. In *Holt* v. *Kirby*, he requested and was

granted leave to file a brief amicus curiae with this Court, in which he attacked the settlement on various jurisdictional grounds. After this Court dismissed its writ in that case, Phillips reappeared as a "consultant" to the newly-arrived "absent" stockholder-plaintiffs Smith and Wiener hereinbelow in Docket No. 31342, *Smith* v. *Fitzsimmons*, one of the three proceedings the results of which petitioners here seek to appeal (Pet. Appx. 70a). By their complaint therein, filed in the District Court on June 8, 1966, eight days after this Court's denial of a petition for rehearing in *Holt* v. *Kirby*, Phillips' "consultees" once again charged that the *Zenn* settlement and judgment had been procured by fraud, with the variation that this time the Referee, rather than Phillips, was alleged to be the corrupt participant with Kirby in a fraudulent scheme. By its allegations the complaint attacked the attorneys as well as the parties represented in *Zenn* (Pet. Appx. 2148-49, 71a-75a; Rec. in 31342 at pp. 1-25).

Defendants in *Smith* v. *Fitzsimmons* moved for summary judgment and submitted an affidavit of unequivocal denial of each of the unsupported charges of the complaint from the Supreme Court Referee who had been maligned in the complaint (Rec. in 31342 at pp. 255-57). The plaintiffs in their opposing papers did not controvert any of these sworn averments, nor did they attempt to sustain any of their complaint's allegations by any kind of sworn statement or evidence of any kind (Pet. Appx. 2153-54, 69a, 76a). The District Court dismissed the complaint and in its order of March 1, 1967 specifically directed that "Further attempts to reopen the litigation may subject plaintiffs' counsel personally to the costs thereof as provided in 28 U. S. C. § 1927" (Rec. in 31342 at pp. 587-88).

Meanwhile, on October 21, 1966, Phillips' same "consultees" had already commenced their second litigation (Docket No. 31115 herein) by way of a motion in the same District Court for leave to intervene in the adjudicated case of *Alleghany* v. *Kirby* for the purpose of having the judgment in that case vacated for fraud on the ground that the Court of Appeals had lacked jurisdiction to consider the appeals in that case in 1963 and 1964 because of Kirby's coming back into control of Alleghany after the appeal was argued in 1963.[5] Petitioners claimed that that issue had been "concealed" by all parties in that case (Pet. Appx. 2145). Since the facts they relied on had in fact been specifically presented to the Court of Appeals by all sides when it considered that appeal (Pet. Appx. 2143; Rec. in 31115 at pp. 9-23), Judge Weinfeld dismissed that motion as being so devoid of merit as to warrant no discussion (A2-A3 *infra*). They then moved to vacate his decision on the ground that Judge Weinfeld, too, had plainly lacked jurisdiction, and that motion was denied (B1 *infra*). Their unsuccessful appeal from that decision comprises appeal Docket No. 31115, from the result in which they also seek to appeal here.

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[5] In April 1965 the petitioners Holt and McMahon made the same claim for leave to intervene in the same case as "absent parties" whose interests had not been adequately represented therein, at a time when the case was still *sub judice* and the corporation had declined to petition for writ of certiorari. The District Court and the Court of Appeals rejected their application as untimely and without merit, finding that the interests of the corporation and its stockholders had been adequately represented. 344 F. 2d 571 (2d Cir. 1965). This Court, after hearing argument thereon, dismissed their petition for writ of certiorari on that issue as improvidently granted, *sub nom. Holt* v. *Alleghany*, Oct. Term 1965 (Docket No. 131).

After filing appeals from both that decision and the decision in *Smith* v. *Fitzsimmons*, the same parties, this time openly joined by Phillips, moved de novo in the Court of Appeals to reopen its judgment in *Alleghany* v. *Kirby*, No. 28397, on the ground of fraud allegedly committed on it, reasserting the same charges they had made in the District Court in *Smith* v. *Fitzsimmons*, and for the first time offering as "evidence" certain "notes" allegedly possessed by their "consultant," Randolph Phillips, throughout the course of the aforedescribed series of proceedings, and a charge that the Referee's Report in *Zenn* (State) had not been prepared by the Referee but instead by Thomas F. Daly, Esq., a senior partner in the New York law firm of Lord Day & Lord, who had represented Kirby at one point in the *Zenn* (State) case (Pet. Appx. 2154-59).

In the Court of Appeals defendants submitted unequivocal denials from each of the attorneys, including Mr. Daly and others slurred by Phillips (Pet. Appx. 2156-59). Again the petitioners offered no substantiation for their assertions, other than (1) Phillips' statement that an unnamed attorney "who requests that his identity not be disclosed" was allegedly told by the court reporter who transcribed the Referee's Report that the report had been written by Thomas F. Daly (which the same reporter unequivocally denied under oath) and (2) certain handwritten memoranda allegedly written by Phillips in early June 1960 while *Zenn* v. *Anzalone* was still *sub judice*, long before the action to set aside the settlement in *Alleghany* v. *Kirby* had even been commenced, and which Phillips allegedly kept in his possession for seven years prior to submitting them hereinbelow (*ibid.*).

The Court of Appeals below, reviewing this "evidence" de novo and hearing argument thereon by Phillips, found, first, that the same issues had already been litigated in *Smith* v. *Fitzsimmons*, that all of the same "evidence" had been then available, and that there was no ground to reopen issues already fully litigated (Pet. Appx. 2157-58); and, second, that all of the "evidence" of "fraud" offered by petitioners herein was insubstantial and uncorroborated (Pet. Appx. 2155-59). By a unanimous decision the Appeals Court panel (two of whose three members—Friendly and Smith, JJ.—had dissented from that court's earlier affirmance of the dismissal in *Alleghany* v. *Kirby*) affirmed the District Court's dismissals below and denied the new application made to it to reopen *Alleghany* v. *Kirby* (Pet. Appx. 2133).

Petitioners' "Questions" and the Question Actually Presented

Petitioners have filled six pages with "questions" which they contend are raised by their petition. In fact each of those so-called questions is a will-o'-the-wisp premised either on petitioners' failure to advise the Court that the jurisdictional errors they attribute to the courts below (in questions 1 and 2) consist of those courts' having entertained the very proceedings brought by petitioners themselves, or on matters which have already been set to rest between the parties in previous litigation (questions 3 and 4), or on an issue (question 5) wholly mooted by the Court of Appeals' having considered petitioners' evidence de novo in No. 28397 (see Pet. Appx. 2147-59), or on misleading hypotheses which are not the facts herein (questions 5, 6,

7, 8 and 9—see the findings of the courts hereinbelow, Pet. Appx. 2131-59, 68a-77a; A1-A3, B1 *infra*).

As noted hereinabove, both the complaint in No. 31342 and the motion in No. 31115 were brought in the District Court below by petitioners themselves. After entry of a decision adverse to them in No. 31115 they moved to vacate for lack of jurisdiction of the same court to have disposed of their motion. That motion, too, was denied (see B1 *infra*). They then noticed appeals to the Court of Appeals in Nos. 31342 and 31115, and after losing on both appeals moved the Court of Appeals to vacate its judgment for its own alleged lack of jurisdiction to have heard their appeals, which motion that court also denied (see Pet. Appx. 78a). Thereafter they filed their petition herein, by questions 1 and 2 of which they argue that they should not be denied still a third chance to litigate the same questions because the courts below erred in considering the proceedings which they themselves had brought.

Questions 3 and 4 refer to Smith and Wiener's renewed attempt in No. 31115 to relitigate on behalf of Alleghany the identical question of subject matter jurisdiction of the Court of Appeals over *Alleghany* v. *Kirby* that was specifically presented to and passed on by that court previously in that litigation (see A2 *infra;* see Rec. in 31115 at pp. 9-22; see Pet. Appx. 2143).

Questions 5 and 6 misleadingly pretend that petitioners were somehow prevented from presenting their "evidence" in the District Court. In fact, petitioners themselves moved for summary judgment in No. 31342 in the District Court; and after defendants moved for dismissal and summary judgment of No. 31342 in the District Court on the basis

of affidavits of unequivocal denial of each of petitioners' uncorroborated charges from each individual attacked by petitioners, neither petitioners nor their counsel nor Phillips offered any factual rebuttal to substantiate their claims, by affidavit or otherwise, and the District Court accordingly entered judgment against them. After noticing an appeal therefrom, petitioners then also moved de novo in the Court of Appeals in No. 28397 to reopen *Alleghany* v. *Kirby* on the basis of the same charges. This time they offered Phillips' memoranda as their evidence. The Court of Appeals held that petitioners were not entitled to an endless profusion of litigations by electing first to withhold their "evidence" in the District Court and, after they failed there, starting again de novo on a claim that the District Court had no jurisdiction to have considered their cause (see Pet. Appx. 2157-58, 2159, 76a).

Petitioners' remaining "questions" simply pose issues of fact which both courts below (the Court of Appeals taking evidence de novo) determined in all respects against petitioners (see Pet. Appx. 2148-59).

In fact the only issues presented on this petition are whether each and every stockholder of a corporation which is a party to a judgment, by calling himself an "absent party" to that judgment, is entitled separately to relitigate for the corporation on his own theory the same issues that have already been adjudicated as to the corporation; and whether this Court should review the findings of fact of the District Court and the Court of Appeals below that petitioners' charges were completely unsubstantiated. We submit that such issues do not deserve serious consideration by this Court.

Argument

The petition is replete with oft-repeated assertions of "ex parte" and "secret" meetings, "bargaining" between the Referee and Alleghany's Vice-President in *Zenn*, and much more in a similar vein. Suffice it here to say that as demonstrated by the thorough findings of the Court of Appeals below (Pet. Appx. 2132-59), the "facts" presented in the petition consist entirely of the colorful hypotheses unreservedly indulged in by petitioners in their complaint below, all of which both the District Court and the Court of Appeals (making findings de novo) found to be unsubstantiated (see esp. Pet. Appx. 2156-59). To elaborate on petitioners' misrepresentations here would serve no useful purpose, and we instead refer the Court to the detailed findings of the Court of Appeals and the District Court below, which are appended to the petition for certiorari and to this brief.

The instant litigation is but the latest in a series of attempts by a disgruntled and discharged former Alleghany employee, Randolph Phillips, to vent his spleen on his former employers. Phillips has been active in promoting this litigation since the inception of its earliest predecessors in 1954 and 1955. He promoted and defended the *Zenn* settlement in 1959 and 1960, argued for fee awards based on its value in 1964, and then in 1966 proceeded to attack that settlement as improperly procured, on the basis of so-called facts which he claims he knew back in 1960.*

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* The other petitioners herein were procured as plaintiffs below through the efforts of Phillips in concert with the wife of their attorney Bobrick, Elizabeth Most, herself originally a plaintiff below, who solicited other stockholders to join her and Mr. Phillips in bringing a lawsuit through her husband (Pet. Appx. 70a-71a).

In fact, Phillips has practically made a vocation of suing Alleghany and its subsidiaries and their officers so that, in the words of its President, Charles T. Ireland, Jr., in testimony in *Alleghany* v. *Kirby*, Alleghany became "a retainership for law firms" (p. 175 of trial transcript, 60 Civ. 3511, S. D. N. Y.). *E.g.*, in addition to *Zenn* v. *Anzalone*, *Breswick* v. *Briggs*, and *Holt* v. *Kirby*, see *Willheim* v. *Murchison*, 203 F. Supp. 478 (S. D. N. Y.), *aff'd*, 303 F. 2d 276 (2d Cir. 1962); *Phillips* v. *Murchison*, 194 F. Supp. 620 (S. D. N. Y. 1961); *Rosen* v. *Alleghany*, 133 F. Supp. 858 (S. D. N. Y. 1955); *Phillips* v. *Alleghany*, Sup. Ct., N. Y. Co. (12788/1965); *Phillips* v. *Bradford*, 228 F. Supp. 397 (S. D. N. Y. 1964); *Ackert* v. *Bryan*, U. S. C. A. (2d Cir., June 21, 1963). His efforts in these actions have variously been described as a "bizarre proceeding" (Ryan, C. J., in *Phillips* v. *Bradford*, 228 F. Supp. at 398) and as a "cavalier and outrageous use of the federal courts" (Kaufman, J. in *Ackert* v. *Bryan*).

We respectfully submit that—to paraphrase Mr. Justice Holmes—three generations of lawsuits are enough. There is no justification whatsoever for petitioners' substanceless efforts to resurrect this twice-laid-to-rest litigation, and still less for their persistent misuse of the legal process in aid of such efforts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Opinion of Hon. Edward Weinfeld Denying Petitioners' Motion in Appeal Docket No. 31115 as Being Without Merit

[Filed November 7, 1966]

[1]* UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#32909

FILED

Nov. 7, 1966

60 Civil 3511

ALLEGHANY CORPORATION,

Plaintiff,

—against—

ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY,

Defendants.

EDWARD WEINFELD, D. J.

This is the latest attempt to resurrect a case that apparently and hopefully had been put to rest when the Court of Appeals, en banc, by an equally divided court,

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* Numbers in brackets correspond to numbering of pages in official opinion on file in the District Court.

affirmed the judgment of the District Court entered on June 3, 1963,[1] and thereafter sustained an order denying intervention by [2] certain stockholders.[2]

A new group now moves for leave to intervene in this action and to void the judgment so entered and affirmed. The application centers about a contention that the resumption of corporate control by the Kirby interests on December 4, 1963, two days after the original panel of the Court of Appeals heard oral argument of the appeal from the judgment, foreclosed any justiciable controversy between "parties having adverse legal interest," in consequence of which the original panel of the Court of Appeals and the en banc court, were without jurisdiction to render their respective judgments. The fact that the Kirby group regained control of the corporation was fully disclosed to the Court of Appeals. Moreover, the central issue before the panel which sustained the denial of the prior application for intervention concerned this shift of control and adequacy of representation. Finally, the [3] *South Spring* case,[3] so strongly pressed by counsel, was specifically called to the court's attention. It is sufficient to say that in the light of the entire record before the

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[1] Alleghany Corp. v. Kirby, 218 F. Supp. 164 (S. D. N. Y. 1963), aff'd, 333 F. 2d 327 (2d Cir. 1964), aff'd on rehearing en banc by an equally divided court, 340 F. 2d 311 (2d Cir. 1965), cert. dismissed as improvidently granted sub nom. Holt v. Alleghany Corp., 384 U. S. 28 (1965).

[2] Alleghany Corp. v. Kirby, 344 F. 2d 571 (2d Cir. 1965), cert. dismissed as improvidently granted sub nom. Holt v. Alleghany Corp., 384 U. S. 28 (1965).

[3] South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U. S. 300 (1892).

Court of Appeals, the application is not only without merit, but requires no discussion of the contentions made by the movants.

The motion is denied.

Dated: New York, N. Y.
November 7, 1966

/s/ EDWARD WEINFELD
United States District Judge

APPENDIX B

Endorsement of Hon. Edward Weinfeld Denying Petitioners' Motion to the District Court to Vacate His Decision for Lack of Jurisdiction, in Appeal Docket No. 31115

The within motion is denied in all respects.

December 9th 1966

/s/ EDWARD WEINFELD
USDJ

U. S. District Court
FILED
DEC. 9, 1966
S.D. of N.Y.

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SUPREME COURT, U. S.

FILED
OCT 3 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 482

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

against

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY: CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of ALLEGHANY CORPORATION,

Petitioners,

against

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY: CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioners Morris Smith, Randolph Phillips, and David Wiener, suing as stockholders in the right of Alleghany Corporation ("Alleghany"), petition this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit denying their three separate and belated attempts to reopen a judicially approved settlement of certain stockholders' derivative actions which were commenced in 1954.[1]

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[1] The opinion of the Court below is reported at 394 F.2d 381 and is set forth in Petitioner's Appendix at pages 2132 to 2159.

Previous attempts by other shareholders of Alleghany to reopen the settlement of the same stockholders' derivative actions have been rejected by the District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and this Court *sub nom. Alleghany* v. *Kirby,* 218 F. Supp. 164 (S.D.N.Y. 1963), *aff'd.* 333 F.2d 327 (2d Cir. 1964), *aff'd on rehearing by an equally divided court,* 340 F.2d 311 (1965), *cert. dismissed as improvidently granted after oral argument sub nom. Holt* v. *Kirby,* 384 U.S. 28 (1966).[2]

The Genesis of This Litigation and Prior Proceedings Below

The Genesis of This Litigation

In denying a prior application by petitioners Holt and McMahon to intervene in *Alleghany* v. *Kirby,* Judge Kaufman of the United States Court of Appeals for the Second Circuit prophetically said, "The aspect of [Alleghany's] litigious history presently before us . . . may occupy no more than a footnote when the definitive chronicle is written . . ." (344 F.2d at 572).

Judge Smith, of the same Court, in rejecting the present petitioners' attempts, as erstwhile champions of Alleghany, to reopen the judicially approved settlement of the stockholders' derivative actions commenced in 1954 commented, "This case is, in a sense, a footnote to a footnote." (394 F.2d at 388; Petitioner's App. p. 2145.) Petitioners, by the instant petition, are apparently attempting to add a footnote to a footnote to a footnote to the definitive chronicle of the litigious history of Alleghany.

In 1949-1950, certain directors and officers of Alleghany Corporation, including Allan P. Kirby ("Kirby") exchanged shares of Alleghany owned by the directors and

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[2] Randolph Phillips, one of the petitioners herein, filed a brief as *amicus curiae* in this Court in *Holt* v. *Kirby.*

officers for shares of Investors Diversified Services (IDS) owned by Alleghany. The propriety of this transaction and other related transactions was challenged in a series of shareholder derivative actions brought on behalf of Alleghany against Kirby and numerous other defendants in 1954. The State Court derivative actions were consolidated under the title of *Zenn* v. *Anzalone*. During this period, two shareholders' derivative actions were commenced in the Federal Court, *Zenn* v. *Anzalone* and *Breswick* v. *Briggs*.

In 1955 hearings were commenced to inquire into the adequacy and fairness of a settlement offer made by the defendants in the *Zenn* consolidated shareholders' derivative actions. Respondent Robert J. Fitzsimmons was appointed the Referee by the New York State Supreme Court and the Special Master by the Federal District Court to conduct these hearings. After numerous, intensive and searching hearings were held during which thousands of pages of testimony and legal argument were considered and after the settlement proposal had been modified and improved all the actions were settled in 1959. In December of 1959, the New York State Supreme Court approved and confirmed the settlement of the consolidated stockholders' derivative actions.

None of the petitioners was a party to those proceedings. Petitioners Smith and Wiener were not even stockholders of Alleghany at the time the settlement proposal was made in 1955. Petitioner Randolph Phillips, although not a party to those proceedings, acted as a "financial consultant" to certain of the suing shareholders and, as such, was instrumental in obtaining the settlement and was an active proponent of its approval by the New York Supreme Court. For his services as a "financial consultant," Randolph Phillips was awarded $392,000 by the New York State Supreme Court in 1965. Thus ended the first chapter of this phase of the litigious history of Alleghany.

In 1960, John D. Murchison and Clint W. Murchison, Jr., suing as shareholders of Alleghany, commenced an action in the District Court for the Southern District of New York charging that Kirby, Randolph Phillips and other defendants had procured the settlement of the *Zenn* consolidated stockholders' actions by fraud.

While this action was pending and before the trial, the Murchisons gained voting control of Alleghany. They thereupon subsituted Alleghany for themselves as the plaintiff and retained the same counsel to prosecute the action.

After a lengthy trial, final judgment dismissing the action on the merits was entered on June 3, 1963, on the decision of the late Judge Dawson, *Alleghany* v. *Kirby,* 218 F. Supp. 264. An appeal was taken to the Second Circuit Court of Appeals, and that Court heard oral argument on December 2, 1963. On December 4, 1963, after argument of the appeal, Kirby regained voting control of Alleghany. On May 19, 1964, the Court of Appeals for the Second Circuit affirmed the judgment of dismissal (333 F.2d 327) and on January 12, 1965, the Court of Appeals for the Second Circuit sitting *en banc* by a 4-4 vote adhered to the judgment of affirmance (340 F.2d 311). The independent directors of Alleghany then decided to proceed no further with this litigation. Thus ended the second chapter of this phase of Alleghany's litigious history.

In April of 1965, two minority shareholders of Alleghany, Margaret L. Holt and Kathleen L. McMahon, sought leave to intervene for the purpose of filing a petition for a Writ of Certiorari in this Court. Their application was denied by Chief Judge Ryan on April 9, 1965, and the Court of Appeals for the Second Circuit affirmed Chief Judge Ryan's decision and order thereon. *Alleghany Corp.* v. *Kirby,* 344 F.2d 571. Both the District Court and the Court of Appeals found that the petitioners, Holt and McMahon, had no right to intervene because their application was not timely and because they had not established inadequacy of representation. Thereafter, this Court

granted certiorari on both the denial of intervention and the affirmance by the Court of Appeals of the action on the merits. After a full hearing on both questions, this Court dismissed both writs of certiorari as improvidently granted. *sub nom Holt* v. *Alleghany Corp.*, et al., 384 U.S. 28 (1966). Thus ended the third chapter of this phase of Alleghany's litigious history.

Prior Proceedings Below by the Present Petitioners

By Notice of Motion dated October 21, 1966, petitioners herein moved in the District Court for the Southern District of New York for an order pursuant to Rule 60(b)(4) FRCP, granting them leave to intervene for the purpose of declaring void the judgment entered in *Alleghany* v. *Kirby* on June 3, 1963.[3] That motion was predicated on the contention repeated herein that after the Court of Appeals for the Second Circuit heard oral argument on the appeal and before it affirmed, defendant Kirby gained control of Alleghany. Alleghany opposed that motion on the ground *inter alia* that the judgment was valid since the case had not ceased to be a justiciable case or controversy when it was decided by the Court of Appeals for the Second Circuit or by this Court.

In denying petitioners' motion below in the District Court, Judge Weinfeld held that the issue of the shift in control of Alleghany had been disclosed to the Court of Appeals prior to the *en banc* decision and that this issue had in fact become the critical issue before the panel of the Court of Appeals which sustained the denial of the application for intervention made in 1965 by the petitioners Holt and McMahon.[4] Moreover, as the record shows, the issue

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[3] Elizabeth Most, the wife of petitioners' attorney herein, was also a party to this proceeding in the District Court.

[4] Petitioners have not included the decision of Judge Weinfeld as part of their appendix. That decision is, however, included as part of the appendix to the brief of the respondents who are guardians of the property of Allan P. Kirby, Jr.

of the shift in control of Alleghany had been disclosed to the Court of Appeals prior to the argument before the original three judge panel of the Court of Appeals which affirmed the dismissal of the complaint in *Alleghany* v. *Kirby*.

Petitioners then petitioned the District Court for an order vacating Judge Weinfeld's decision on the ground that Judge Weinfeld did not have jurisdiction to entertain their motion. Petitioners so argued despite the fact that in support of their motion before Judge Weinfeld they argued that the District Court did have jurisdiction to consider the motion. Petitioners' petition to vacate Judge Weinfeld's decision was denied on December 9, 1966. Thus was concluded the first part of the fourth chapter of this phase of the litigious history of Alleghany.

On June 18, 1966, petitioners Smith and Weiner commenced an action in the District Court for the Southern District of New York captioned *Smith* v. *Fitzsimmons et al.* The complaint in that action repeated the charges made originally in *Alleghany* v. *Kirby* that the settlement in *Zenn* had been procured by fraud, alleging this time that the fraud was between Kirby and Fitzsimmons rather than Kirby and Randolph Phillips. Randolph Phillips reappeared in *Smith* v. *Fitzsimmons* as an advisor to the present petitioners. The complaint in that action sought to vacate the *Zenn* settlement and to rescind the 1949/50 IDS transactions. The complaint also sought to have Fitzsimmons return the money he had received as Referee and Special Master. And finally the complaint sought the liquidation and dissolution of Alleghany.

The petitioners moved for summary judgment on the first count of the complaint. Defendant Alleghany moved to dismiss the complaint on the ground that the petitioners were not entitled to the relief sought against it. The individual defendants moved for summary judgment. Alleghany also requested an order taxing its reasonable attorneys' fees against the petitioners and their counsel.

The District Court per Bonsal, *J.*, granted Alleghany's motion to dismiss the complaint and granted the motions of the individual defendants for summary judgment, stating that

> "... this action which seeks to reopen the Alleghany litigation on the basis of conclusory and unsupported allegations of fraud hardly appeals to the conscience of a court of equity ..." (Petitioners' App. p. 77a)[5]

The District Court did not tax attorneys' fees but warned that any further attempts by petitioners' attorney to reopen this litigation might result in his being personally liable for defendants' attorneys' fees.

Thus was concluded the second part of the fourth chapter of this phase of Alleghany's litigious history.

Petitioners then appealed to the United States Court of Appeals for the Second Circuit from the order of the District Court per Weinfeld, *J.*, denying their motion to vacate Judge Weinfeld's prior decision denying their motion to vacate the judgment in *Alleghany* v. *Kirby* and from the order per Bonsal, *J.*, granting the defendants' motions for summary judgment and for judgment dismissing the complaint in *Smith* v. *Fitzsimmons*.

While those appeals were pending and prior to argument, petitioners applied to the Court of Appeals for the Second Circuit for an application to that Court sitting *en banc* for an order under Rule 19(c) directing petitioners to conduct an investigation to aid the Court in determining if its judgment was procured by fraud upon it and the "absent parties." The Court of Appeals for the Second Circuit directed that this application be heard by the same panel scheduled to hear the appeals in *Alleghany* v. *Kirby* and *Smith* v. *Fitzsimmons*.

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[5] The memorandum decision of Judge Bonsal is reported at 264 F. Supp. 268.

The charges leveled by petitioners in their Rule 19(c) application were the same charges of fraud that had been previously held groundless in *Smith* v. *Fitzsimmons*. In the 19(c) application, however, Randolph Phillips submitted certain memoranda allegedly made by him in 1960.

The Court of Appeals for the Second Circuit, after considering all of the so-called evidence, including the Phillips' memoranda, denied the application pursuant to Rule 19(c), stating

> "At most, the application stands on a porous foundation and, in any case, our consideration of it is barred by reason of the litigation of the same issues in *Smith* v. *Fitzsimmons* and their determination by Judge Bonsal on summary judgment sought by plaintiffs themselves. All the matter put forth in support of the so-called 19(c) motions was or could have been presented to Judge Bonsal and may not be held back and subsequently used as the basis for relitigation of the same issues." (394 F. 2d at 394; Petitioners' App. 2159).

The decision of the Second Circuit also affirmed the order of the District Court denying petitioners' motion to intervene in *Alleghany* v. *Kirby* for the purpose of declaring the judgment therein void and affirmed the order of the District Court in *Smith* v. *Fitzsimmons*.

After the decision of the Second Circuit Court of Appeals was filed, petitioners moved to vacate it and the judgment entered thereon. Petitioners' motion to vacate was denied without opinion on June 5, 1968.

Thus was concluded part three of chapter four of this phase of Alleghany's litigious history.

Petitioners now petition this Court for a Writ of Certiorari to review the aforesaid decisions of the Second Circuit Court of Appeals, thus commencing part four of chapter four of this phase of the litigious history of Alleghany.

Questions Presented

Petitioners suggest that some nine different questions are presented by their petition and offer six reasons why this Court should grant a Writ of Certiorari. In fact, the petition presents one question, the answer to which has never been in doubt: Where stockholders' derivative suits have been settled with court approval after extensive hearings and the settlement was subsequently attacked as having been procured by fraud by two different groups of shareholders at two different times and the United States District Court, the United States Court of Appeals, and this Court have rejected the attacks on the settlement, can a third group of shareholders such as the petitioners herein (one of whom appeared in this Court as an *amicus* in one of the prior attempts to reopen the settlement) endlessly attack the settlement by conjuring up new theories of fraud and alleged error? The decision of the Court of Appeals correctly answered that question in the negative. The Court of Appeals also found that after reviewing the evidence of fraud petitioners' attempts to reopen the *Zenn* settlement stood at best "on a porous foundation."

A Consideration of the Reasons Offered by the Petitioners for the Granting of a Writ of Certiorari

I.

Petitioners argue that the assumption of jurisdiction by a three-judge panel over their appeals and motions to vacate a judgment heard and determined by the Court of Appeals sitting *en banc* constitutes an impairment of the *en banc* jurisdiction and presents an important federal question. This argument demonstrates the lengths to which petitioners will go in misusing the procedure for Federal appellate review and then in a subsequent stage in the ap-

pellate process claim that their misuse was an error that deprived them of certain undefined rights. Petitioners themselves commenced the action entitled *Smith* v. *Fitzsimmons* in the District Court for the Southern District of New York and themselves moved for summary judgment therein. It was in that action that petitioners chose to allege that the *Zenn* settlement had been procured by fraud between *Kirby, Fitzsimmons* and others. Petitioners themselves chose to move to intervene in the District Court in *Alleghany* v. *Kirby* for the purpose of declaring the judgment in that case void because the case had ceased to be a justiciable case or controversy when it was decided by the original three-judge panel which heard the first set of appeals in that case. Only after the motion to intervene in *Alleghany* v. *Kirby* was denied and defendants' motions for summary judgment in *Smith* v. *Fitzsimmons* were granted, and pending the appeal from those decisions did petitioners petition the Court of Appeals for the Second Circuit sitting *en banc* pursuant to Rule 19(c). Thus, petitioners wish this Court to review the decisions below on the merits because petitioners themselves employed various procedural steps which petitioners now claim were improper.

Petitioners also conveniently overlook the fact that their application pursuant to Rule 19(c) was referred by the Court of Appeals to the three-judge panel hearing petitioners' appeals in *Smith* v. *Fitzsimmons* and *Alleghany* v. *Kirby*.

In short, petitioners, with characteristic temerity, request this Court to review this litigation which has occupied the attention of the State and Federal Courts for some fifteen years because they now say that the procedure they employed in their three-pronged attack below was improper.

II.

Petitioners argue that the Court below decided an important question of Federal law contrary to the decisions of this Court when it held that the three-judge panel which heard the original appeal on the merits in *Alleghany* v. *Kirby* had jurisdiction notwithstanding that Kirby regained control of Alleghany after oral argument was heard. As the Court below noted, the cases relied upon by the petitioners were clearly inapposite. The Court below further noted that the issue of the shift of control was brought to the attention of the Court of Appeals and that the determination implicit in its decision that there was a controversy is *res judicata* and not open to collateral attack (394 F.2d 288-389; Petitioners' App. p. 2146-2147).

Furthermore, as noted, Randolph Phillips, one of the petitioners herein, appeared as *amicus curiae* in this Court in *Holt* v. *Alleghany*. Phillips, though presenting what he styled as a Federal question in his *amicus* brief before this Court, failed at that time to allege that the shift in control of Alleghany deprived the Court of Appeals of jurisdiction.

III.

Petitioners' third reason is in substance an amalgam of their first and second reasons. Petitioners contend that the Court below committed error when it applied the doctrine of *res judicata* to petitioners' jurisdictional questions since two of the three petitioners were not parties to the prior proceedings. Admittedly, petitioners Smith and Wiener were not *named* parties to the prior proceedings in *Alleghany* v. *Kirby* but the action was brought on behalf of all shareholders and thus binds petitioners Smith and Wiener. Petitioner Phillips was originally a defendant in *Alleghany* v. *Kirby*, and, as noted, subsequently appeared in this Court in that case as *amicus*.

Thus, stripped of its conclusory rhetoric, petitioners' third reason is an argument premised upon false factual

assumptions and contrary to fundamental legal principles regarding the nature and effect of judgments in shareholders' derivative actions.

IV.

'Petitioners' fourth reason is nothing more than a thinly disguised re-statement of their first reason. Petitioners contend that since the District Court did not have jurisdiction to consider its Rule 60(b) motion in *Alleghany* v. *Kirby,* the Court of Appeals erred when it held that the so-called evidence produced by Phillips on the Rule 19(c) application could have been presented before the District Court in *Smith* v. *Fitzsimmons.* This argument not only stands on a "porous foundation," but is a blatant attempt to create an issue by confusing two separate and unrelated determinations by the Courts below.

In their Rule 60(b) motion in *Alleghany* v. *Kirby,* petitioners contended that the three-judge panel that heard the original appeal in *Alleghany* v. *Kirby* lacked jurisdiction because of the shift in control of Alleghany. In *Smith* v. *Fitzsimmons,* petitioners leveled their charges of fraud in the procurement of the *Zenn* settlement. *Smith* v. *Fitzsimmons* was a new action commenced by the present petitioners and did not involve any Rule 60(b) motion. The Court of Appeals held that it was not necessary to determine whether the Rule 60(b) motion should have been made in the District Court only after applying for leave to so move from the Court of Appeals, since it held on the merits that the shift in control of Alleghany Corporation did not deprive the original three-judge panel of jurisdiction.

That determination by the Court below had no bearing whatsoever on the failure of petitioners to submit the Phillips' memoranda to the District Court when the motions for summary judgment were heard in *Smith* v. *Fitzsimmons* by Judge Bonsal. Moreover, the decision below makes it clear that the Court of Appeals not only found that the so-called

evidence consisting of the Phillips' memoranda was or could have been put before Judge Bonsal but that after its consideration of that evidence it concluded that "at most, the [19c] application stands on a porous foundation . . ."

V.

Petitioners' fifth and sixth reasons are merely attempts to have this Court review and re-evaluate the evidence which the Courts below have previously examined. Petitioners argue that the decisions below involved the standard of conduct to be applied to a Federal Special Master. In fact, the decisions below clearly enunciate a high standard of conduct to be applied to a Federal Special Master consistent with the existent statutory and decisional law and conclude that petitioners completely failed to demonstrate that those standards were not met.

Alleghany and the State and Federal judiciaries have been embroiled in this litigation for decades. The expense and nuisance of the constant, continuous relitigation of an ancient transaction are beyond estimate. The independent directors of Alleghany long ago determined that further proceedings could only burden all concerned rather than benefit the corporation, and the courts have several times sustained that determination as well as the validity of the settlement sought to be upset by the petitioners. Now at last an end should be declared and final judgments accorded the finality they were intended to have.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Alleghany Corporation

ANTHONY F. PHILLIPS
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1968

No. 462

MORRIS SMITH, RANDOLPH PHILLIPS, and DAVID WIENER, individually and on their own behalf and that of all other shareholders of Alleghany Corporation similarly situated and derivatively on behalf of Alleghany Corporation,

Petitioners,

against

ALLAN P. KIRBY, JR. and FRED M. KIRBY II as Guardians of the Property of ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and ROBERT J. FITZSIMMONS, and ALLEGHANY CORPORATION,

Respondents.

ANSWERING BRIEF OF RESPONDENT ROBERT J. FITZSIMMONS

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212 WO 4-5770

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Respondents.

ANSWERING BRIEF OF RESPONDENT ROBERT J. FITZSIMMONS

Preliminary

The petitioners have "consolidated" in this Court two actions and a proceeding, only one of which involves the respondent Fitzsimmons. The only action or proceeding to which Fitzsimmons is a party is the one entitled *Morris Smith and David Wiener,* Plaintiffs against *Robert J. Fitzsimmons, Allan P. Kirby, Jr. and Fred M. Kirby II as Guardians of the Property of Allan P. Kirby and Alleghany Corporation, Defendants,* (66 Civ. 1938) (hereinafter

"Smith action"). The Smith action was commenced in the United States District Court for the Southern District of New York in 1966.

The device of "consolidation" is utilized by petitioners in an improper attempt (See, *Lawn* v. *United States*, 355 U.S. 339, 354 (1958)) to bring before this Court matters not contained in the record of the *Smith* action. Thus none of the matter set forth in the petition (pp. 21-24, pars. (x) through (xiv), is in the record of the *Smith* action. Such matter was supplied by petitioners for the first time to the Court of Appeals in a so-called Rule 19(c) application, which was never served by petitioners upon Fitzsimmons and to which he is not a party.

Questions Presented

1. Whether stockholders in a derivative stockholder's action brought in the United States District Court may relitigate questions which have been once litigated in the Courts of a State in a different derivative stockholder's action?

2. Is a Referee appointed by the Supreme Court of the State of New York who is thereafter appointed Special Master in the United States District Court answerable for his conduct as such Referee and as such Special Master in a subsequently commenced private litigation brought in the United States District Court?

Statement of the Case

The complaint in the *Smith* action sets forth four alleged claims; only the first, third and fourth claims are asserted against Fitzsimmons (3a-33a).*

* Figures (-a) refer to pages in petitioners' appendix in the Court below; figures (-b) refer to pages in Fitzsimmons' appendix in the Court below; figures (K-) refer to pages in Kirbys' appendix to the Court below.

The first, third and fourth claims appear to be that orders and judgments of the Supreme Court of the State of New York, County of New York, made in 1959 and 1960, in a stockholder's suit brought on behalf of respondent Alleghany Corporation, entitled *Zenn* v. *Anzalone* ("Zenn action"), which approved a settlement of the Zenn action and awarded fees to Fitzsimmons for his services as Referee in the Zenn action and as Special Master in a related stockholder suit pending in the United States District Court for the Southern District of New York, entitled *Breswick Co.* v. *Briggs* ("Breswick action"), should be set aside in this wholly collateral Smith action.

The pleaded grounds for the collateral attack on the State Court orders and judgments are

1. In 1960 the New York Supreme Court fixed Fitzsimmons' compensation both as Referee and Special Master (5a-6a). In fact all parties knew that the Supreme Court would so fix Fitzsimmons' compensation, all parties had an opportunity to litigate this issue, and United States District Judge Dimock authorized such procedure (13b, 12b-13b, 14b, K 139a, 15b, 16b).

2. Fitzsimmons and Alleghany's attorney secretly negotiated this compensation even though such attorney had a conflict in his duties to Alleghany and to Kirby (7a, 8a). The allegation of secrecy is then recanted and it is alleged that Fitzsimmons reported the "secret" negotiations to the Supreme Court (cplt. par. 23, 8a). There is not a word of evidence to support the allegations of "secret" negotiations and conflict of interest, and all of the evidence refutes such allegations (16b, 50a).

3. Fitzsimmons did not write his report recommending approval of the settlement of the *Zenn* action in the New York Supreme Court, and that it was

written by Kirby's lawyer (16a). Again there is not a word of evidence to support this allegation. All of the evidence refutes such allegation (21b).

4. Fitzsimmons generally acted improperly in conducting hearings as State Court Referee and in making his findings and conclusions as such Referee (11a, 18a, 19a, 20a, 22a, 23a, 24a, 25a, 27a, 29a). There is no evidence to support such allegations. All of the evidence refutes such allegations (3b-7b, 8b-24b). In any event as matter of law, Fitzsimmons cannot be called to account in a private lawsuit for his judicial conduct as Referee and Special Master.

The relief demanded against Fitzsimmons is that he repay the $125,000 which the State Court allowed him for his fees as Referee and Special Master (30a-31a).

The facts in more detail

By order of the Supreme Court, New York County, dated August 18, 1955, Fitzsimmons was appointed Referee to inquire into the fairness of a proposed settlement of the Zenn action (10b). While Fitzsimmons was holding hearings in the Zenn action, the United States District Court for the Southern District of New York, by order dated October 3, 1956, appointed him Special Master to hear and report as to whether an injunction issued in the Breswick action should be vacated (10b). The injunction barred the defendants in the Breswick action from pleading as a defense any judgment resulting in the State Court from the settlement of the Zenn action (10b).

About November 17, 1958 Fitzsimmons filed his report with the State Court recommending approval of the proposed settlement of the Zenn action (10b-11b); at the same time Fitzsimmons filed his report with the District Court recommending that the injunction be vacated in the Breswick action (11b). These reports were written solely by Fitzsimmons, with the aid of his partner Mooney, and no other attorney or person was involved therein (21b).

Mr. Justice McGivern of the State Court confirmed Fitzsimmons' report in the Zenn action in an opinion filed on March 11, 1959, but directed that until the injunction in the Breswick action was vacated, no judgment approving the settlement could be entered in the Zenn action (11b).

Judge Dimock of the District Court ruled that the record in the Breswick action should be at least co-extensive with the record made before Fitzsimmons in the Zenn action (11b), and remitted the matter to Fitzsimmons for further hearings (11b). Fitzsimmons had scheduled new hearings pursuant to Judge Dimock's ruling when the parties in the Breswick action commenced settlement proceedings and reached an over-all settlement of all actions (12b).

Proceedings were held before Judge Dimock on a new application to vacate the injunction (12b). During the hearings the attorney for an objectant in the Zenn action, who spoke on behalf of the plaintiffs in the Breswick action, advised Judge Dimock that all applications for fees would be made in the Zenn action (12b-13b).

Judge Dimock on December 24, 1959 approved the said over-all settlement and vacated the injunction (13b, 24b). Mr. Justice McGivern then made orders, entered on December 28 and 29, 1959, dismissing the complaint in the Zenn action upon compliance by defendants with the terms of the over-all settlement (13b).

Mr. Justice McGivern's order, which, as is customary, was prepared and approved by counsel for all parties, expressly provided that Fitzsimmons could apply to the State Court for his fees both as Referee in the State Court and as Special Master in the District Court (13b).

Fitzsimmons reports had been filed more than one year (11b) prior to the entry of the orders in the Zenn action and in the Breswick action approving the settlement (13b, 24a). Once those reports were filed there was nothing

Fitzsimmons could do to affect the settlements. The only thing left for him to do was to apply for his fees.

Before Fitzsimmons applied for his fees, he called upon Judge Dimock to bring Judge Dimock up to date on developments (13b, 14b). Fitzsimmons told Judge Dimock that under Justice McGivern's order he was authorized to apply to the State Court for his fees both as Referee in the Zenn action and as Special Master in the Breswick action (13b, 14b, K 139A), and that he would do so unless Judge Dimock desired that he do otherwise (13b, 14b, K 139A). Judge Dimock told Fitzsimmons that he had no objection and that Judge Dimock would not require Fitzsimmons to apply to the District Court for his fees as Special Master (14b, K 139A).

Fitzsimmons thereupon applied to the State Court in May 1960 for his fees both as Referee and as Special Master in the amount of $150,000 (14b, 16b). The application was made on notice to all counsel or persons who had appeared at any time in either of the actions—33 attorneys and law firms (15b).

Thus opportunity was given to all who had evidenced any interest in the proceedings to litigate any aspect of Fitzsimmons' fees. No one opposed his application except the attorney for Alleghany who argued that $150,000 was excessive, but made no recommendation as to what he considered proper (16b).

Fitzsimmons then met with Alleghany's counsel and suggested that he file an affidavit setting forth his views as to the proper amount so that Fitzsimmons could reply thereto and thus pose the issue of amount of his fees fairly in the record (16b). Alleghany's counsel said he would consider the matter and discuss it with his associate counsel (16b); Fitzsimmons did not ask Alleghany's counsel to concur on an amount (50a) and such counsel did not indicate that he would concur on an amount (50a).

There was no further contact between Fitzsimmons and Alleghany's counsel (16b). Mr. Justice McGivern apparently did contact Alleghany's counsel and subsequently fixed Fitzsimmons' fees at $125,000 (16b).

The proceedings herein

In 1966, the petitioners commenced this action in the District Court. Fitzsimmons and the other respondents herein moved under Rule 12, Fed. R. Civ. R. to dismiss the complaint for failure to state a claim for relief and under Rule 56, Fed. R. Civ. P., for summary judgment. The plaintiffs also moved for summary judgment on the first claim. On the record made before him the District Judge (Bonsal, *J.*) granted respondents' motions to dismiss the complaint and for summary judgment (68a-77a; 264 F. Supp. 268), and the Court of Appeals unanimously affirmed, 394 F. 2d 381 (2 Cir. 1968).

Inasmuch as petitioners commenced this action in the District Court, we are at a complete loss to understand their contention that the District Court could not administer this case, and that only the Court of Appeals sitting *en banc* had original jurisdiction thereover (Pet. pp. 11, 28-33). If the District Court did not have original jurisdiction over the Smith action, then petitioners should not have filed their complaint in the District Court and should have filed it in the Court of Appeals. We know of no authority in the Rules for such procedure, but certainly if the District Court did not have original jurisdiction then no appeals Court could have appellate jurisdiction.

By the same token, if petitioners had any evidence to meet Fitzsimmons' motion for summary judgment, it was their duty to adduce the same in the District Court (Rule 56; Fed. R. Civ. P.). It is too late after a trial in, or after summary judgment has been granted by, the District Court to claim that evidence was withheld by petitioners from the District Court so that it could be presented to the Court of Appeals. All appellate Courts are bound by the record made in the District Court. *Lawn* v. *United States*, 355 U.S. 339, 354 (1958).

Summary of Reasons Why Certiorari Should Be Denied

The Courts below decided the Smith action on the bases of well settled rules of law properly applied to undisputed facts. There is no conflict in the decision below with any decision of this Court or of any Court of Appeals; to the extent that the decision below involves either State or Federal questions, the law is well settled and was decided below in conformity with the decisions of this Court, of other Courts of Appeals, and of the New York State Courts. There is no departure here from accepted and usual course of judicial proceedings.

The Court below said (p. 391 of 394 F. 2d):

> "Since the matter of Fitzsimmons' fee was submitted to the state court, and the parties in *Zenn* were free to object to the amount and to raise any issues pertaining to the fee award, the matter is now closed under the principle of the res judicata".

The Court below further noted that collateral attacks on the subject matter jurisdiction of the State Court were also foreclosed. This was in response to petitioners' contention that because of Rule 53(a) Fed. R. Civ. P., only the District Court could fix the fees of a Special Master. The Court below said (p. 391 of 394 F. 2d):

> "With few exceptions a collateral attack upon the subject matter jurisdiction of a court in which both parties have appeared is prohibited notwithstanding the failure of the parties to litigate the issue. *United States* v. *Eastport Steamship Corporation*, 255 F. 2d 795, 803 (2 Cir. 1958)"

ARGUMENT

I.

The claims against Fitzsimmons are barred by estoppel.

The attacks which petitioners now level in their complaint against Fitzsimmons' fees could have been raised in the State Court, and any error of the State Court (jurisdictional or otherwise) could have been reviewed on appeal from the State Court judgment. *Sheriff* v. *Heyman*, 23 App. Div. 2d 555 (1st Dept. 1965) affd. 16 N.Y. 2d 944 (1965); *Cross Properties, Inc.* v. *Gimbel, Bros. Inc.*, 15 App. Div. 2d 908 (1st Dept. 1962).

Accordingly, since any error could have been corrected on appeal, no independent, collateral action, such as the one at bar can be maintained. *Ackermann* v. *U.S.*, 340 U.S. 193 (1950); *Simmons* v. *Saul*, 138 U.S. 439, 458-60 (1891); *Graham* v. *Boston H. & E. R.R.*, 118 U.S. 161, 177-8 (1886).

Judge Dimock authorized the application by Fitzsimmons to the State Court for fees both as Referee and as Special Master. If the State Court failed to apply or erroneously applied Rule 53(a) Fed. R. Civ. P., such error is immaterial. *Gart* v. *Cole*, 263 F. 2d 244 (2 Cir. 1959) cert. den. 359 U.S. 978 (1959). Even if Rule 53(a) vests exclusive jurisdiction in the District Court to fix the fees of Special Master, any error of the State Court in assuming jurisdiction could have been corrected by appeal ultimately to this Court. *Leiman* v. *Guttman*, 366 U.S. 1 (1949); *Brown* v. *Gerdes*, 321 U.S. 178 (1944). No independent collateral action, such as the one at bar, will lie. *Ackermann* v. *U.S.*, 340 U.S. 193 (1950). The estoppel of the State Court judgment is fully effective. *Angel v. Bullington*, 330 U.S. 183, 189 (1947); *Tomiyasu* v. *Golden*, 358 F. 2d 651, 653 (9 Cir. 1966).

It was open for any party in the State Court to litigate the question of who should pay Fitzsimmons' fees, whether or not they could be based in any part on services rendered as Special Master, and the amount thereof. The State Court judgment is thus res judicata of every issue sought to be raised here. *Grubb* v. *Public Utilities Commission*, 281 U.S. 470, 479 (1930); *Statter* v. *Statter*, 2 N.Y. 2d 688 (1957).

It is legally immaterial whether the findings and judgment of the State Court resulted from stubborn contention or by way of concession. *Statter* v. *Statter*, 2 N.Y. 2d 688, 673 (1957). Any claim of newly discovered evidence is likewise legally immaterial and will not lift the bar of estoppel. *Statter* v. *Statter*, 2 N.Y. 2d 668, 674 (1957).

The rules laid down in the *Statter* case are well settled. See, *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321-2 (1927); *Wolcott* v. *Hutchins*, 245 F. Supp. 578, 580 (S.D.N.Y. 1965); *Phillips* v. *Bradford*, 288 F. Supp. 397, 401-2 (S.D.N.Y. 1964); *Crouse* v. *McVickar*, 207 N.Y. 213, 217-19 (1912); *Hinchley* v. *Sellers*, 7 N.Y. 2d 287, 293 (1959).

Petitioners, claimed stockholders of Alleghany, are of course bound by the judgments in the Zenn action, a true class action. *Stella* v. *Kaiser*, 218 F. 2d 64, 65 (2 Cir. 1954) cert. den. 350 U.S. 835 (1955); *Gart* v. *Cole*, 263 F. 2d 244, 247-8 (2 Cir. 1959) cert. den. 359 U.S. 978 (1949) and cases cited at pp. 247-8 of 263 F. 2d; *Gary* v. *Gary*, 6 Misc. 2d 669 (Sup. Nassau 1957); cf. *Rehill* v. *Rehill*, 306 N.Y. 126 (1953). *Hansberry* v. *Lee*, 311 U.S. 32 (1940) a spurious class suit is utterly inapplicable.

II.

The allegations that Fitzsimmons had a disqualifying interest in the actions are legally insufficient.

Petitioners make vague and conclusory allegations in their complaint that Fitzsimmons was disqualified to act as a Referee, presumably under Section 14 of the Judiciary Law of New York.

Section 14 disqualifies a Referee or a Judge if he has an interest in the action he is deciding. The law is settled that a Referee or Judge has no such interest unless his interest is

> "of such nature as would involve direct pecuniary gain or loss." *Matter of Hancock*, 91 N.Y. 284, 292-3 (1883).

The interest

> "must be real; it must be certain and not merely possible or contingent; it must be one which is visible, demonstrable and capable of precise proof." *People* v. *Whitridge*, No. 2, 144 App. Div. 493, 498 (1st Dept. 1911).

Fitzsimmons concededly filed his reports in November 1958, and orders and judgments approving the same were entered in December 1959. The complaints were dismissed in December 1959, subject to compliance with the terms of the settlement. These terms were complied with by May 13, 1960, and Alleghany then delivered general releases to the defendants in the stockholder suits (218 F. Supp. 179). On June 21, 1960, final judgment was entered dismissing the *Zeus* action on the merits.

If, contrary to fact, Fitzsimmons negotiated for his fee in June 1960, it is obvious that such negotiation conferred no interest in Fitzsimmons. Such dealings could not possibly have influenced his previous actions almost two years earlier and there is neither corruption nor disqualification. *Moers* v. *Gilbert* 175 Misc. 733 (Sup. N.Y. 1941), affd. 261 App. Div. 957 (1st Dept. 1941).

Universal Oil Products v. *Hall*, 76 F. 2d 258 (8 Cir. 1935), is not in conflict with the decision of the Court below. In the *Hall case*, a Special Master was appointed with power and directions to hear testimony and make and report findings of fact and conclusions of law to the Court. Before the proceedings commenced, the Special Master induced the

parties to stipulate that he should receive a fee of $100 per day plus expenses and disbursements and "any additional sum that may be allowed by the Court" (p. 259 of 76 F. 2d).

The Court of Appeals in *Hall* ruled that the Special Master had "exacted" the stipulation for his fees from the parties. Nonetheless, although the Court removed the Special Master for the purpose of making the findings of fact and conclusions of law, the Special Master was allowed to retain his fees for the 550 days claimed to have been devoted to the taking of testimony at the stipulated rate of $100 per day (pp. 262, 264 of 76 F. 2d).

III.

Judicial immunity bars the claims against Fitzsimmons.

With the exception of the allegations concerning Fitzsimmons' application for fees, all of the allegations relating to Fitzsimmons concerned his alleged conduct while acting as Referee and Special Master.

A Referee or Special Master is a judicial officer. *Schwimmer* v. *U.S.*, 232 F. 2d 858 (8 Cir. 1956) cert. den. 352 U.S. 833 (1956); *McCormick* v. *Walker*, 158 App. Div. 54 (1st Dept. 1913).

The law is settled beyond all doubt that Fitzsimmons may not be called to account in any private action for his alleged conduct as Referee or Special Master. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bradley* v. *Fisher*, 13 Wall. (80 U.S.) 335 (1872); *Lange* v. *Benedict*, 73 N.Y. 12, (1878).

Petitioner's contention based upon the civil rights Act (42 U.S.C. Secs. 1983, 1985) is unavailing to overturn the judicial immunity of Fitzsimmons. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (2 Cir. 1955) cert. den. 350 U.S. 867 (1955).

IV.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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212 WO 4-5770

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